Neutral Citation Number: [2019] EWHC 2188 (TCC)

Case No: E91BS379

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
TECHNOLOGY AND CONSTRUCTION COURT LIST

2 Redcliff Street
Bristol BS1 6GR

Date: 22/08/2019

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

SOLARIA ENERGY UK LIMITED	**Claimant**
- and -	
DEPARTMENT FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Defendant**

- -
- -

Guy Adams (instructed by **Capital Law Limited**) for the **Claimant**
Tom Weisselberg QC and **Dominic Howells** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date 26 July 2019

- -

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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HH JUDGE RUSSEN QC

HH Judge Russen QC :

Introduction

1. This is my judgment upon the Application dated 12 February 2019 and issued by the Defendant ("**the Department**") against the Claimant ("**Solaria**"). By its application the Department seeks the striking out of, or, alternatively, the grant of summary judgment against the Claim brought against it by Solaria. Further truly alternative relief is sought by the Department in the form of an extension of time for the service of its Defence in the event of it not persuading the court to grant the primary relief sought.

2. By a Claim Form issued on 21 December 2018 Solaria seeks damages in the order of £460,000 from the Department on the ground that it has "suffered loss arising as a result of the [Department's] unlawful action in accordance with s. 8 Human Rights Act 1998". Solaria's accompanying Particulars of Claim explain that the company carries on the business of supplying and distributing solar energy products and in particular photovoltaic panels for use in solar electricity generating installations ("**PV installations**"). The claim for damages is based upon loss allegedly suffered as a result of the publication on 31 October 2011 (by the Department for Energy and Climate Change ("**the DECC**") which later merged with another government department to form the Department by its present name) of a consultation document which contained a proposal to reduce the subsidy payable under the Feed-in Tariff Scheme in respect of electricity generated by PV installations ("**the Proposal**"). The Department is the successor department in respect of the administration of the Feed-in Tariff Scheme ("**the FIT scheme**") which was aimed at encouraging the low-carbon generation of electricity by specified types of technology.

3. The making of the Proposal is alleged by Solaria to have constituted an unlawful interference with its right to peaceful enjoyment of its possessions, contrary to Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("**A1P1**"), for which the Department is now liable. On that basis, and A1P1 being set out in Schedule 1 to the statute, Solaria claims damages under section 8 of the Human Rights Act 1998 ("**the Act**").

4. The Proposal concerned the FIT scheme which had been in effect from 1 April 2010. It was that lower tariffs should be payable in respect of new PV installations with a reference date of on or after 12 December 2011. The Government had become concerned about the cost of the FIT scheme when, by the end of 2010, it had become clear that the number of PV installations was far greater than anticipated as a result, in part, of a greater than anticipated reduction in the cost of their installation (as I read from the judgments in the *Breyer* litigation mentioned below). The lawfulness of the Proposal was challenged in judicial review proceedings commenced in early November 2011 and by his decision on 21 December 2011, in *R (Friends of the Earth) v SSECC* [2011] EWHC 3575 (Admin); [2012] ACD 28, Mitting J held that it would be unlawful to implement the Proposal. The Court of Appeal dismissed an appeal against that decision on 26 January 2012. The Supreme Court refused an application for permission to appeal on 22 March 2012. The Proposal was therefore never implemented. While the first stage of that appeal process was ongoing a

revised proposal was laid by the Minister before Parliament on 19 January 2012 and that revised one (with a later reference date of 2 March 2012) took effect without any challenge to its legality.

5. However, Solaria alleges that the publication of the Proposal was an unjustified interference with its possessions, contravening A1P1, which resulted in foreseeable loss to it. Those arguments are based upon the fact that, in July 2011, Solaria had entered into a sub-contract for the supply of photovoltaic panels and associated accessories ("**PV panels**") to a company known as GB Building Solutions Limited ("**GBBS**"). GBBS later went into administration on 9 March 2015 but in 2011 the company had enjoyed the benefit of a contract with Northumberland County Council ("**NCC**") to supply PV installations at residential and commercial properties within the county. GBBS contracted with Solaria for the supply of the PV panels to GBBS (the two companies in fact occupied adjoining premises) required for GBBS to meet its commitments to NCC.

6. In support of the suggested merits of its claim Solaria points to the settlement the Department reached with a group of other claimants in litigation which they had brought against the DECC claiming damages for losses allegedly suffered as a result of the Proposal ("***Breyer***"). Each claimant in *Breyer* was either a small-scale solar PV generator or a nominated recipient of payments under the FIT scheme or engaged in a business connected with PV installations (including companies supplying equipment to other PV installation companies). Their complaint was that, by the time the courts had ruled that the Proposal was unlawful, many of the PV installations that would otherwise have been completed by 1 April 2012 had been abandoned as a result of it. They sought damages on the basis that the Proposal was an unjustified interference with their peaceful enjoyment of their A1P1 possessions. Certain preliminary issues were identified for determination in *Breyer* (on the basis of assumed facts which would have fallen to be determined on a claim-by-claim basis had the litigation proceeded to a trial) first by Coulson J as he then was (see [2014] EWHC 2257 (QB); [2015] 2 All ER 44) and then, on the DECC's appeal and the claimants' cross-appeal, by the Court of Appeal: see [2015] EWCA Civ 408; [2015] 1 WLR 4559.

7. I return below to the courts' reasoning in relation to the A1P1 possessions point. It seems that all but one of the claimants in *Breyer* had brought their claims within the time limit of one year stipulated by section 7(5)(a) of the Act and no limitation point to be taken by the DECC at the preliminary issue stage. Shortly before the trial of the claims in *Breyer* was due to commence in January 2018 settlements were reached between the Department and some of the *Breyer* claimants which, coupled with discontinuance by others, meant that the trial never took place. I was told (and the solicitors' correspondence before me referred to the fact having been unearthed in March 2018 by a freedom of information request) that the settlements cost the Government in the region of £60 million.

8. I also return below to the question of loss and the suggested cause of it, in circumstances where GBBS went into administration owing Solaria significant sums in respect of PV panels supplied between January and July 2012 (and therefore after the Proposal had met its fate) but for the moment it is important to note the basis upon which Solaria says it has a claim under section 8 by reference to a contravention of A1P1.

Solaria's Claim

9. Looking at the circumstances in which Solaria found itself at the time the Proposal was made, paragraphs 20 and 21 of the Particulars of Claim read as follows:

> "20. In the circumstances, immediately before 31 October 2011 [Solaria] had the benefit of an enforceable contract with GBBS under which GBBS was obliged to pay the contract price for the contracted works and was obliged to pay a price calculated on the same basis for the additional 300 house installations in Phase 1.2, which it had been decided by NCC and GBBS to order from [Solaria]."
>
> "21. The benefit of the contract and/or the goodwill in that part of [Solaria's] business which was concerned with providing goods and services under the contract was a possession and/or were possessions with the meaning of A1P1. In particular:
>
> 21.1 the contract had significant economic value, namely the capitalised value of the expected future cash flow generated by the contract;
>
> 21.2 such economic value could have been realised by an assignment or sub-letting of the contract whether at law or in equity and/or a sale of that part of the business as a going concern which was concerned with providing goods and services under the contract."

10. The reference in paragraph 20 of the particulars to "an additional 300 house installations in Phase 1.2" was based upon Solaria's case that (per paragraph 18) GBBS had carried out 204 PV installations by 10 October 2011 and (per paragraph 19) that NCC and GBBS had agreed on 27 October 2011 that Solaria would be employed as the supplier for another 300 house PV installations to be completed by the end of March 2012. Solaria says that Phase 1.2 was then jeopardised by the Proposal being announced a few days later.

11. The Particulars of Claim (at paragraph 28) state that Solaria and GBBS were at all material times after early November 2011 aware that the lawfulness of the Proposal was being challenged. They refer (at paragraphs 30 to 34) to a discussion between Solaria and GBBS about the implications of the Proposal taking effect. That not only concerned the price payable for Solaria's panels for Phase 1 but also the viability of Phase 1.2. Solaria says that its agreement on 11 November 2011 to reduce the price from £1.35 per watt to £1.10 per watt was conditional upon the Proposal taking effect but the particulars record GBBS's position that the reduction was unconditional. That issue was raised in proceedings between them brought in the Cardiff TCC but was not resolved before GBBS went into administration.

The Department's Response

12. Before the issue of the present proceedings, Solaria's solicitors wrote to the Department with a formal letter of claim on 21 December 2016, intimating a claim for damages under section 8 of the Act in the sum of £714,685. The letter of claim referred to the claim under that section being for "the loss of goodwill of the business represented by the capitalised expected profit on the goods which it was anticipated would be supplied at the contract price before the end of March 2012."

13. In response, the Government Legal Department ("**GLD**") raised a limitation defence by reference to the one year period (from the date when the act complained of took place) stipulated by section 7(5) of the Act. The GLD's letter of 30 January 2017 said that the Claim should have been brought within one year of the publication of the Proposal, and therefore by 30 October 2012; and in those circumstances they would not address the substance of the allegations in the letter of claim. After further lawyers' correspondence, on 21 November 2017 the parties entered into a Standstill Agreement to suspend time from running after 21 December 2016 until either party gave notice to the contrary. The Department entered into that agreement expressly without prejudice to its contention that any claim by Solaria was already time barred by that earlier date. On 30 January 2018 the Department gave notice that time was to start running again with effect from 1 March 2018. The Claim was issued on 21 December 2018.

14. The Department says the Claim is without merit. The curtailment of the proceedings is sought by the Department on the basis that the court can, at this stage of the proceedings and having considered Solaria's Particulars of Claim in isolation from any Defence and (at least so far as the summary judgment limb of the application is concerned) by reference to the written evidence filed on the application, safely conclude that the absence of merit in the Claim is such as to result in Solaria falling foul of the test in CPR 3.4.2(a), in that the particulars disclose no reasonable grounds for bringing it or, alternatively, that in CPR 24.2 which postulates the absence of any real prospect of Solaria succeeding at trial.

15. It is not necessary for me to expound in this judgment the very familiar principles which govern the court's determination of an application under each of those procedural rules. In relation to the principles governing a summary judgment application, Mr Guy Adams on behalf of Solaria did submit that the court only had before it "partial information" on the limitation point and that it could not presently be said that his client had no realistic prospect of overcoming it at trial. As appears below from a reference to its evidence on the application, a flavour of the same point perhaps carries through to Solaria's position on the "A1P1 possessions" issue (introduced in the next paragraph). For the Department, Mr Tom Weisselberg QC and Mr Dominic Howells acknowledged the propositions that the court needs to be satisfied that it has before it all the material necessary for a proper determination of any decisive point of law or construction, if it is to grasp the nettle and decide it, and also that the court will have regard not only to the evidence before it but also the evidence which could reasonably be expected to be available at a trial.

16. Allowing for their slightly different but not divergent focus, the two procedural grounds relied upon by the Department to say, in effect, that the Claim should not have been brought and cannot carry with it any realistic prospect of ultimate success for Solaria are the same under each of them. First, the Department submits that the contractual interests on which Solaria relies cannot amount to "possessions" for the

purposes of A1P1. Secondly, it says there is no prospect of Solaria persuading the court that it is "equitable", for the purposes of section 7(5), to permit the Claim to be made 4 years and 11 months late (even allowing for the period of 14 months or so covered by the Standstill Agreement) when it should have been brought by 30 October 2012; and the court has before it all the material that would be available at trial so to be able to decide the point now.

17. Mr Weisselberg QC and Mr Howells on behalf the Department submitted, in my judgment correctly, that the above matters are two of four points on which Solaria would have to persuade the court of its position if it is to succeed in its claim. The other two matters are that the Proposal constituted an unlawful interference with any A1P1 possessions of Solaria (when the Department would, they say, plead that any interference was justified) and that Solaria suffered loss caused by that unlawful interference. Although the Department does not rely upon those further matters as independent grounds in support of the summary judgment application (the need to take the Particulars of Claim at its face value for the purposes of the strike-out application probably means that they could not properly feature under that limb of the application) it contends that the lack of merit in Solaria's position is relevant to the court's discretion to extend time beyond the one year limitation period under section 7(5).

18. However, Mr Weisselberg QC was anxious to press upon me the submission that, regardless of its underlying merits, the delay in bringing the Claim is fatal to its viability. Indeed, he said that the limitation objection should really be regarded as the primary ground for the application even though it was logical to start with the concept of A1P1 possessions.

A1P1 Possessions

19. A1P1 provides as follows:

> "(1) Every natural person or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

20. The Department contends that Solaria cannot show that its contractual rights and expectations against GBBS amounted to A1P1 possessions.

21. I have already quoted above from paragraphs 20 and 21 of Solaria's Particulars of Claim. In relation to what Solaria says were its possessions within the meaning of A1P1, the particulars rely upon the terms of the sub-contract with GBBS and also a

decision by NCC and GBBS to order a further 300 units from Solaria at the same contract price as that applicable to the initial units covered by the contract.

22. In resisting the application Solaria relies upon the witness statement of Mr Philip Jones of its solicitors Capital Law Limited. In that statement Mr Jones explains that the contract between GBBS and Solaria specified a contract sum of £4,262,400 which represented installations on 400 dwellings and 130 commercial buildings. Although it is not entirely clear from the Particulars of Claim, Mr Adams confirmed that those numbers comprise what they describe as "Phase 1". As I have already mentioned, by the time the Proposal was announced some 204 installations had been carried out but more were proposed under Phase 1 and covered by the contract.

23. In addition to the balance of PV panels required to be supplied in order to complete the numbers for Phase 1, Solaria relies upon a proposal for a further 300 house installations, to be completed by the end of March 2012, described as "Phase 1.2". Phase 1.2 is referred to in paragraph 20 of the Particulars of Claim, quoted above, as being the subject matter of a decision by NCC and GBBS in late October 2011 *to order* PV panels from Solaria.

24. Paragraph 49.6 of the Particulars of Claim therefore identifies Solaria's heads of loss as follows:

    1) the sum of £224,910 representing part of the price of those PV panels supplied to GBBS before 31 March 2012 under Phase 1 for which Solaria had been paid at the rate of £1.10 per watt rather than the contractual rate of £1.35 per watt. The lower rate was paid in accordance with the November 2011 discussions mentioned above even though Solaria's position was that payment at the lower rate was conditional upon the Proposal taking effect;

    2) the sum of £12,627.50 reflecting the same difference in the payment rate in respect of PV panels delivered after 31 March 2012 under Phase 1; and

    3) the sum of £222,497 representing loss of profits that would have been made under orders (for the supply of panels for a further 179 houses) that would have been met under Phase 1.2 had the Proposal not jeopardised that phase. The profits are based upon payment of the contractual rate of £1.35 per watt.

25. These sums are introduced by paragraph 49 as being "the capitalised value of the expected future cash flow generated by the contract which, but for the Proposal, [Solaria] would have received under the sub-contract", or they are certainly relevant to determining that value.

26. As I explain below in the context of the limitation argument, Solaria sought to recover the categories (1) and (2) loss from GBBS, before that company went into administration, but not category (3).

27. The Department says that categories (1) and (2) cannot be sustained as heads of loss in circumstances where they are based upon an alleged interference with contractual rights and where Solaria had no right to assign its contract with GBBS. It is therefore said that those rights lacked what the authorities show to be the relevant indicia of A1P1 possessions; namely, whether they are tangible, assignable or have a present

economic value. The contract was not, it submits, a marketable asset. As to the category (3) head of loss, the Department says the argument for recovering that loss is even more hopeless and cannot be sustained where the same authorities show that the anticipated benefit of a potential future order cannot constitute a possession.

28. In seeking to meet these points (which had been well rehearsed in pre-action correspondence) Mr Jones states, at his paragraphs 41 and 42:

> "41. There are obvious ways in that expected future income could be capitalised including selling the business, or assigning the contract or sub-letting the contract. It is a question of fact as to whether such courses were a practical reality. The fact that prior consent was required for an assignment or prior consent (which consent shall not be unreasonably withheld or delayed was required for sub-letting – [*he here refers to certain standard terms of the Contract between GBBS and Solaria*] - is merely one factor in the factual inquiry.
>
> 42. It is not the case that the value of the contract is something that by its nature is non-assignable, rather it is an economic asset. It is to be contrasted with a contract for personal services which was the subject of *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015. It is further trite that, even if a contract contains an absolute bar on assignment, that does not prevent a party entering into a contract with a third party in order to realise the value of the contract – see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 per Lord Browne-Wilkinson at [108D]:
>
> > "*a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and assignee.*" "

29. These are, of course, essentially legal submissions rather than matters of evidence. In fairness to Mr Jones he was responding to the witness statement of Mr Warrick Olsen on behalf of the Department, in support of the application, which had cited legal authority including *Murungaru*. Nevertheless, beyond referring to the existence of the contract with GBBS, the basis of the contract sum and the intention that more panels would be provided for future installations, Mr Jones did not suggest any other matters would be relevant to the factual part of the inquiry. In particular, Solaria did not challenge Mr Olsen's observation (at paragraph 41 of his witness statement) that: "On [Solaria's] own case, there had been a decision by NCC on 27 October 2011 to order panels for a further 300 houses from [Solaria] but no firm order for the 300 materialised." That accords with what is said in paragraph 20 of the Particulars of Claim.

30. Mr Adams for Solaria submitted that the question of whether or not his client had rights amounting to possessions for the purposes of A1P1 is a question of mixed fact and law. He said the essential question as to whether Solaria had any possessions within the meaning of A1P1 is whether its interest under the contract with GBBS constituted something with a present economic value, whether in its own right or

viewed as an aspect of marketable goodwill. He cited Lord Dyson MR in *Breyer*, at [23], where the Master of the Rolls referred to goodwill which "has been built up in the past and has a present-day value (as distinct from something which is only referable to events which may or may not happen in the future)".

31. Solaria therefore seeks to rely upon the Court of Appeal's decision in *Breyer* to say that its argument on A1P1 possessions has merit. Mr Adams said it is absurd to suggest otherwise.

32. The rival contentions therefore call for consideration of the implications of the decision in *Breyer* and of the other authority to which Coulson J and the Court of Appeal referred.

33. I have already mentioned that some of the claimants in *Breyer* included companies whose businesses included the supply of kit for PV installations to other companies. That said, it seems that their businesses also extended to being responsible themselves for PV installations and obtaining FIT scheme payments accordingly. In any event, it is clear that the determination of the preliminary issues in *Breyer* involved consideration of contracts which (to quote from paragraph [47] of the judgment of Coulson J dealing with those that had been signed or concluded) were:

> "….. those into which the claimants entered on or before 31 October 2011 with occupiers, contractors, financiers, brokers or suppliers in connection with intended solar PV installations, which installations would have been completed by 31 March 2012. The claimants' case is that these contracts were predicated on their anticipated entitlement to the FIT rate of 43.3p per kWh, and that the 31 October proposal rendered these concluded contracts valueless because of the proposal that such a rate would no longer be paid for installations that were not completed by 12 December."

34. Mr Weisselberg therefore described *Breyer* as being concerned with "airspace leases": contracts with owner-occupiers of premises where the anticipated income generated by the FIT scheme would cover the expenditure upon the PV installation. The categories of potential or actual contracts (with associated leases) relied upon by one of the claimants in *Breyer* were identified by the Court of Appeal at paragraph 24 of the judgment of Lord Dyson MR. Although the nature of GBBS's interest in the PV installations is not clear (its sub-contract with Solaria simply referred to the main contract by which NCC was to engage GBBS to carry out the "Works" of design and installation of PV installations in the numbers required by Phase 1) for the purposes of the present claim it would seem that the position of the claimants in *Breyer* was closer to that of GBBS and NCC than Solaria. So far as its contractual terms with GBBS were concerned, and what it says about the contract price being applicable to the proposed Phase 1.2 installations, Solaria was not (at least as a matter of agreement with GBBS) vulnerable to changes in the FIT scheme rate.

35. In *Breyer* at first instance Coulson J held, at [51] and [56], that, as a matter of principle, signed or concluded contracts were capable of constituting A1P1 possessions. This was subject to scrutinising each one in order to see whether it met the relevant indicia identified by Lewison J in *Murungaru v Secretary of State for the*

Home Department [2008] EWCA Civ 1015 (the authority referred to in the parties' evidence).

36. In *Murungaru* the contractual arrangement relied upon as an A1P1 possession by the claimant involved the provision to him of personal services in the form of surgery and post-operative medical treatment and review. The claimant had embarked upon such medical treatment but had been denied access to the country to continue with it by the Home Office's revocation of his entry visa. The Court of Appeal held that the contract for personal services did not amount to an A1P1 possession. Recognising that the concept of "possessions" (or property rights) under the Convention is an autonomous one, and that there is no necessary coincidence between it and the English law concept of property, Lewison J said the touchstone was whether the relevant rights and interests can be regarded as constituting an "asset". Within that core question lay the issue of transmissibility which (per [56]) "although not necessarily the touchstone, [it] is a highly relevant factor." Lewison J concluded, at [58]:

> "In the present case, Dr Murungaru's contractual rights have none of the indicia of possessions. They are intangible; they are not assignable; they are not even transmissible; they are not realisable and they have no present economic value. They cannot realistically be described as an "asset". That is the touchstone of whether something counts as a possession for A1P1. In my judgment Dr Murungaru's contractual rights do not."

37. Allowing for the fact that intangibility of certain contractual rights would not prevent them from constituting A1P1 possessions (if the contract is real enough) the other indicia identified by Lewison J are those which qualified the finding which Coulson J made by reference to the signed or concluded contracts in *Breyer*.

38. As for the other broad category of "contracts" relied upon by the claimants before him, Coulson J held, in *Breyer* at [62], that, in general, contracts which were not signed or concluded did not meet the *Murungaru* test.

39. The judge also observed that it was common ground that "marketable goodwill" could also amount to an A1P1 possession. Noting, however, that both the domestic courts and Strasbourg have repeatedly ruled that claims for loss of future income are not possessions within A1P1, he observed that it was a Herculean task to distinguish between marketable goodwill and losses of such prospective income. However, in relation to goodwill, at paragraphs [78] to [82] he held that the distinction followed his reasoning as between signed or concluded contracts which stood unfulfilled or unperformed as a result of the Proposal, on the one hand, and the loss of possible future contracts, on the other. The latter simply reflected itself in a failure to earn future income or profits which was not protected by A1P1. So far as treating the former as an element of the goodwill of the claimant's business was concerned, this was on the assumption that it could be capitalised and regarded as marketable goodwill and, on that basis, regarded as an A1P1 possession.

40. The reference to the "marketability" of goodwill derived from the decisions in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin); [2007] 1 WLR

2067 and *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265; [2007] 1 WLR 2092. The decisions in *Nicholds* (of Mr Kenneth Parker QC sitting as a deputy high court judge) and *Malik* (of the Court of Appeal) contained earlier recognition of the point that, unlike certain elements of business goodwill, an expectation of future income cannot constitute an A1P1 possession. In *Malik*, Auld LJ recognised that the Court of Appeal in *R (Countryside Alliance) v Attorney General* [2006] EWCA Civ 817, [2007] QB 305 had drawn the same distinction, and when *Countryside Alliance* later reached the House of Lords the same point was recognised: see [2007] UKHL 52; [2008] 1 AC 719, at [21], per Lord Bingham.

41. In the Court of Appeal in *Breyer* it was argued by the claimants, relying upon *Nicholds* and appellate authority approving the reasoning in it, that Coulson J had been wrong to draw a distinction between the marketable value of the goodwill of a business and the future income of that business. The submission was that the customer base of a business, which can be capitalised and given an economic value, included future cash flows from contracts not yet signed but which (it was to be assumed) would have been signed but for the Proposal. Those future cash flows could be given a discounted, present-day value.

42. Lord Dyson MR (with whom Richards and Ryder LJJ agreed) said he saw the force of the claimants' submissions but, like the judge, he said the distinction between goodwill and future income was fundamental to the Strasbourg jurisprudence. He said, at [43]:

> "The important distinction is between the present day value of future income (which is not treated by the European court as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts."

43. For a common lawyer the essence of goodwill which accrues to a business as a result of it being carried on for some time in a particular place or name, or using a particular trade mark, relates to the probability that past or existing customers will return to it despite a change in the ownership of the business or, perhaps, a change in the place from where it is conducted. Any valuation of such goodwill is therefore predicated upon the notion of those customers bringing with them *future income* for the business, even though I would have thought the pricing of it will as often as not be fixed by reference to known, historical turnover figures rather than speculative future ones (accrued book debts, or receivables, might be given their own price). It will, of course, be for those concerned in the business to agree how, if it is to be "marketed", its goodwill is to be valued and paid for in the event of such a change (e.g. in the case of the sale of the business or the retirement of one of its proprietors) but the concept relates to the *accrued capacity* to attract further customers or clients. After all, it must be possible for an incompetent or reckless purchaser of the business to quickly undermine that capacity and the potential which comes with it, even if he has paid handsomely for it, and thereby deprive the business of the hoped-for income stream.

44. That is the basic point which I believe emerges from the judgment of Lord Dyson MR. Even where the valuation of business goodwill does reflect an element of book debts which are anticipated but not yet crystallised, as opposed to being based solely upon past financial results as an indication of future turnover, it is clear from *Breyer* that the value of a future income stream does not qualify as an A1P1 possession. Nor can that discounted value be brought within the concept of goodwill to produce a different conclusion. On that point, the Master of the Rolls (at [49]) said that Coulson J was right, as a matter of principle, to separate existing enforceable contracts from possible future contracts. Only the former might be said to be part of the goodwill of the business "because they are the product of its past work."

45. It is also clear that, in order to qualify for A1P1 protection, the goodwill of the business must be marketable. As I have already noted, the parties in *Breyer* did not disagree on that point. The Master of the Rolls said, at [23]:

> " ……. (iii) a number of factors may point towards the loss being goodwill rather than the capacity to earn future profits: these include marketability and whether the accounts and arrangements of the claimant are organised in such a way as to allow for future cash flows to be capitalised; (iv) goodwill may be a possession if it has been built up in the past and has a present-day value (as distinct from something which is only referable to events which may or may not happen in the future) ….."

46. It is that paragraph of the judgment upon which Mr Adams relied in support of the alternative submission that Solaria's contract with GBBS constituted something with a present economic value, and therefore as an element of its marketable goodwill, even if the contract was not in and of itself an A1P1 possession.

47. The authorities indicate that the concept of *marketable* goodwill is rather an elusive one. It appears to me that it might cause as much difficulty as that encountered in ensuring that, for A1P1 purposes, the present-day value of a future income stream is not sought to be introduced in the guise of that intangible asset.

48. Lord Dyson's linkage of marketability to organisational factors ("accounts and arrangements") was based upon what the deputy judge had said in *Nicholds*, at [73]. In *Malik*, at [65] and [83] to [85] respectively, Rix and Moses LJJ were less convinced that marketability should be the determinant of whether goodwill qualifies as an A1P1 possession but, with Auld LJ, they were able to dispose of the appeal on the basis that Dr Malik was precluded by his professional regulations from selling any goodwill attached to his right to practise in the NHS. In *Nicholds* the court considered the concept of goodwill as an asset with a monetary value for the purposes of distinguishing the entirely personal licence, conferring permission to act as a door supervisor, under consideration in that case. In *Countryside Alliance*, Lords Bingham, Hope and Brown held that the hunting ban engaged the A1P1 rights of some of the claimants but that any interference with them was justified. In observing that A1P1 had been engaged for some of them, Lord Bingham referred, at [20] to "the owners of businesses which have lost their marketable goodwill, a shareholder whose shares have lost their value, and so on." He went on to say that he considered that the Court of Appeal in *Malik* had reached the right conclusion in the light of Strasbourg

jurisprudence (which he did not find to be very clear) upon goodwill as an A1P1 possession.

49. Therefore, none of these English cases really had to grapple with a detailed analysis of how, on the particular facts before the court, the goodwill asserted by the claimant could be said to be an A1P1 possession *because* it was shown to be "marketable". Nevertheless, it seems to me to be clear from the authorities that goodwill will only be an A1P1 possession if the profession, trade or business to which it is attached has been organised in a way that enables the court to identify an element of goodwill which has been attributed a monetary value separate from that of the tangible assets of the business and which value is, at least in principle, capable of being realised on sale, assignment or other dealing. The most obvious way of establishing this would be to identify the relevant value in the accounts of the business (subject, as the court observed in *Nicholds*, to the possibility of it actually being lost or written down as an accounting exercise).

50. With the above principles in mind I can now turn to the three categories of loss advanced by Solaria in paragraph 49 of the Particulars of Claim on the basis that they flow from the DECC's unjustified (and therefore unlawful) interference with an A1P1 possession.

51. The argument in relation to categories (1) and (2) is based upon an alleged interference with Solaria's right under its sub-contract with GBBS. Subject to the argument that it can be analysed as a component of Solaria's marketable goodwill, the issue here is whether the contract carries with it the indicia of a possession within A1P1.

52. In the light of the decision in *Murungaru*, which was followed by Coulson J in *Breyer*, I regard the key question to be whether or not the contractual rights which Solaria enjoyed under the contract had a monetary value which could be marketed for consideration. Although Solaria had negotiated with GBBS a contract which had an economic value to it at the date of the Proposal (and in that respect this business contract was clearly in a different category from Dr Murungaru's ongoing medical treatment) the weight of authority indicates that, as with goodwill, whether or not that value is marketable is the central consideration. I have already noted that Lewison J said that transmissibility was not necessarily the touchstone but he said it is "a highly relevant factor" and went on to note the significance which the Court of Appeal in *Malik* had attached to rights which were not transferable and therefore lacked economic value. The bundle of rights could not be viewed as an "asset". In *Breyer*, by contrast, Coulson J noted that, on the basis of the assumed facts, the contracts before him were assignable.

53. As I observed during the course of counsel's submissions, if a package of contractual rights may be treated as an A1P1 possession regardless of whether they can be analysed as constituting assets (and, as such, transmissible) then one might expect many proceedings in which a public authority is alleged to have committed, or perhaps to have induced, a breach of contract to also include a claim under A1P1 for good measure (assuming the proceedings are brought promptly enough). Yet the decision in *Murungaru* is clear in establishing that not all contractual rights amount to property or to an A1P1 possession.

54. By an amendment to the JCT 2005 Design and Build Sub-Contract in the present case, it was agreed that Solaria would not assign the sub-contract or any rights under it without the prior written consent of GBBS. A similar restriction was placed upon the "sub-letting" of the whole or any part of the sub-contract, with the proviso that GBBS's written consent would not be unreasonably withheld or delayed. The Department contends that the absence of a right in Solaria to assign the contract without GBBS's consent means that its economic value was not a marketable one. The sub-contract also contained certain warranties given by Solaria direct to NCC and they included the warranty that Solaria would continue to perform its obligations under the sub-contract (and not assign that warranty).

55. In response, Mr Adams' skeleton argument made the points contained in paragraphs 41 and 42 of Mr Jones' witness statement which I have already quoted above. He submitted that Solaria might have realised value for the contract by dealing with it even without GBBS's consent and that the point is reinforced by the reference to the obligation upon GBBS not to unreasonably withhold or delay its consent to a sub-letting.

56. I am satisfied, to the standard which reflects the ultimate burden upon the Department as the applicant for summary judgment, that this is not a good response.

57. Taking the sub-letting scenario first, I have difficulty in seeing how delegating to a sub-subcontractor the responsibility for performing the whole or any part of Solaria's contract with GBBS could be regarded as an exercise in realising value for Solaria's rights under the contract. As one would expect, the JCT terms expressly provided that any sub-letting would not relieve Solaria from its sole responsibility for completing the contract with GBBS and, on that basis, the terms envisage that contractual payments will trickle down from Solaria to the sub-subcontractor rather than be passed up from that further party. As a matter of analysis, such a sub-letting would not involve Solaria dealing with its contractual rights and obligations, as against GBBS, and it is fanciful to think that the sub-contractor would pay Solaria a premium for taking on the burden of performing the obligations on behalf of Solaria.

58. As for the suggestion that Solaria might have assigned its sub-contract without GBBS's consent, this of course only reinforces the basic point that Solaria had no right to assign. Although the JCT terms held out the prospect that GBBS might give its prior written consent to an assignment, the restriction upon Solaria dealing with its contractual rights is not materially different in effect from the regulatory restraint upon Dr Malik selling his patient list. As Mr Weisselberg and Mr Howells observed, Solaria's contract was one for design, labour, plant and materials and was expressly incapable of assignment. Whereas it might be sensible to talk of Solaria's PV panels as an A1P1 possession, it is difficult to see why the contract for their supply should be regarded as such. I also accept their submission that any sum which Solaria might have persuaded a purported assignee to part with on an unlawful assignment of that contract, executed without the consent of GBBS, would necessarily not reflect the economic value of the contract. It seems to me that one only has to contemplate the likely claim by the "assignee", for recovery of its money when the failure in Solaria's consideration became fully apparent, to see why that is so.

59. Solaria's contractual rights therefore lack the attributes of an asset when tested by the *Murungaru* criteria and, in my judgment, cannot be categorised as an A1P1

possession. They had a value to Solaria (assuming the sub-contract was a profitable one) but it was not a readily realisable or marketable value.

60. What of Solaria's alternative case that the rights are to be treated as being part of its goodwill, which can be so categorised?

61. The short answer to this alternative contention is that Solaria has adduced no evidence, which might have been produced on this application to demonstrate some substance to the point if it existed, to show that that the value of the sub-contract (or some part of that value) has in fact been treated as part of its goodwill. Although Lord Dyson in *Breyer* did not confine the possibilities to the claimant's accounting arrangements, a good start for Solaria would have been to show that the remaining performance under its sub-contract with GBBS was not wholly reflected within the current assets and current liabilities of its balance sheet. Instead, I am left with the clear impression that the concept of goodwill has been mentioned by Solaria simply because it featured in the *Breyer* decisions. There is no evidence which even begins to support the concept of marketable goodwill in the present case and, in those circumstances, I am unpersuaded by the argument that a trial is needed to test the practical reality of Solaria's postion.

62. Mr Jones's reference to the capitalisation of future income on a sale of Solaria's business appears to fall on the wrong side of the line established by the Strasbourg jurisprudence but, even if it does not, the notion that Solaria might subsequently choose to analyse that as part of some marketable goodwill is no substitute for the need to show that it has already done so. In any event, and as the Department pointed out, it would be the shareholders of Solaria, not the company itself, who would appear to have the A1P1 possession in that eventuality: compare the observation of Lord Bingham in *Countryside Alliance* at [20].

63. I have therefore concluded that Solaria has no real prospect of succeeding in establishing its claim for damages under categories (1) and (2).

64. As for category (3), this rests upon the Proposal's alleged interference with Phase 1.2. However, it is clear even on Solaria's case that no firm order had been placed with Solaria in respect of any of the additional 300 PV installations. There is no real prospect of recovering damages when, at the date of the Proposal, it held no concluded contract for the supply of further PV panels beyond those falling within Phase 1: see Coulson J in *Breyer*, at [62]. Nor can an order which Solaria hoped to secure, but which it had not secured by the date of the Proposal, form part of any marketable goodwill even if Solaria had organised its affairs in recognition of such an asset: see Lord Dyson MR in *Breyer*, at [49].

65. It should be noted that Solaria did not seek to recover the category (3) head of loss from GBBS in the proceedings it brought against that company in August 2014, which I mention below in the context of the limitation issue. That reinforces the point that Solaria had not entered into a contract for the supply of PV panels under Phase 1.2.

66. In my judgment, therefore, Solaria has no real prospect of succeeding in its damages claim and summary judgment should be granted in favour of the Department accordingly.

67. However, the Department has urged me to address its limitation argument as free-standing basis for its application. Both parties have addressed the issue and I therefore now turn to it.

Limitation

68. Section 6 of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right and section 8 provides for a possible claim in damages. In regulating the timing of any proceedings by a victim of an allegedly unlawful act section 7 provides as follows:

> "……..
>
> (5) Proceedings under subsection 1(a) must be brought before the end of-
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances.
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

69. As with the A1P1 issue, Mr Adams on behalf of Solaria submitted that the court should not on this summary judgment application attempt to determine whether it is "equitable" that the claim should have been brought not by 30 October 2012 but only much later, on 21 December 2018.

70. I should mention at the outset one matter which Mr Adams sought to introduce very briefly during the course of his argument on the limitation point. He urged the court not to dismiss the claim on the basis that it is statute barred, should I reach that conclusion, when Solaria might amend its Claim to plead a case "in tort" against the Department. When this provoked me to observe that even the 6 year limitation period for a tortious claim had now expired he responded by saying (with CPR 17.4(2) clearly in mind) that the proposed new claim would arise out of the same facts and matters as those in issue on the present one. I need say no more about this in circumstances where no proposed amendment had even been formulated and where the only hook for any such (non-time-barred) amendment is the claim which the Department's application, issued in February 2019, seeks to remove on the basis that it (the existing claim) is statute barred.

71. In relation to the claim that has been brought, Mr Adams relied upon the decision of the Court of Appeal in *Walkley v Precision Forgings Ltd* [1978] 1 WLR 1228, 1238C, in saying that a claim should only be summarily dismissed by reference to a limitation argument where there was a clear case for doing so. Because Mr Adams and the same firm of solicitors instructing him had been involved in an earlier case before me which then came to mind, I pointed out that even limitation arguments which involve

consideration of the claimant's state of knowledge at a particular point in time may sometimes be susceptible to summary determination provided always that the court can be confident that it is not doing so in ignorance of further material evidence which is not currently before it, but which might reasonably be expected to be available at a trial: see *Davy v 01000654 Ltd* [2018] EWHC 353 (QB), at [19], and the authorities cited in that judgment. One of the authorities cited by the parties on the present application – *KR v Bryn Alan Community Ltd* [2003] EWCA Civ 85; [2003] 3 WLR 107, at [74(vi)] – contains encouragement for the preliminary determination of any application for an "equitable" extension of time in personal injury cases.

72. When pressed by me to identify the particular reasons why the court should not dispose of the claim summarily Mr Adams eventually said that the two most significant factors were, first, that his client had a good claim in the light of the decision in *Breyer* and, secondly, that the Department's assertion that it has suffered prejudice through the delay was not something that should be accepted at face value. Instead, the Department should be required to plead its Defence and to serve its evidence. Only then would it become clearer as to whether or not there is substance to the Department's submission that its witnesses' memories will have faded over the greater part of the decade before any trial of the present claim takes place. Mr Adams observed that there must have been considerable preparation within the Department for the anticipated trial in *Breyer*, in early 2018, which would stand it in good stead for a trial with Solaria in 2020 or 2021.

73. As appears from my decision above on the A1P1 possessions issue, I disagree with Mr Adams' assessment of the merits of his client's claim. However, when he made the submission he did so by reference to his client's perception of its merits unclouded by my own. He referred to the Department's compromise with those *Breyer* claimants who had not discontinued their claims as an indication of its strength; saying that the Department did not have the confidence to take the remaining claims to a trial. As the Department relies upon limitation as a discrete ground for granting its application, I will assume that I am wrong in my conclusions on the A1P1 possessions issue and that, viewed in isolation from section 7(5), Solaria has a good claim.

74. Proceeding on that assumption, the obvious point to note about the "merits" argument is that, as a matter of common sense, it seems unlikely that by itself such an argument will carry the day for an otherwise time-barred claimant. I say that because it immediately begs the question as to why, encouraged by its own confidence of success, Solaria did not bring (or even notify) its claim against the Department sooner. What other reasons operated to put a brake upon it bringing proceedings to vindicate its claim and, as between claimant and defendant, can they be said to be good ones for the court exercising its discretion under section 7(5)(b)?

75. As for Solaria's second point – the need to test the Department's assertion of prejudice – it is clear that this arises by way of suggested rebuttal of a point made by the Department in circumstances where Solaria's delay has given it the opportunity to make it. Again, therefore, the more pertinent question becomes "why the delay in the first place?"

76. In truth, Solaria has no intelligible answer to that question. The facts show that instead of promptly bringing its A1P1 claim against the DECC, before October 2012, Solaria continued to deliver PV panels to GBBS until July 2012. It did so in return

for being paid at the rate of £1.10 per watt, rather than £1.35 per watt, but *on its own case* upon the post-Proposal agreement reached with GBBS it did so in circumstances where (the Proposal having subsequently foundered) it should have been entitled to payment at the full rate. Indeed, in July 2013 Solaria issued an invoice to GBBS for the greater part of what it now seeks to recover from the Department under the categories (1) and (2) heads of loss; and on 26 August 2014 it issued proceedings against GBBS for recovery of the difference. As I have already noted, those proceeding were stayed following the appointment of administrators of GBBS in March 2015.

77. For completeness, I should also note that in March 2015 Solaria sought to recover from NCC the value of certain PV panels which had been delivered on site but ownership of which was asserted by Solaria. Doing so resulted in a compromise with NCC in May 2018 which resulted in a net recovery of approximately £24,000.

78. By the time Solaria got around to suing GBBS the primary one year period applicable to any proceedings against the DECC had of course passed but it is noteworthy that Solaria did not then think to bring proceedings under the Act. After all, its present claim against the Department proceeds on the footing that it was the publication of the Proposal that had resulted in GBBS paying for the PV panels only at the lower rate.

79. Mr Jones, in his witness statement on behalf of Solaria, states that the steps taken to secure recovery from GBBS and NCC were taken in furtherance of the overriding objective in circumstances where it is likely his client would have been criticised if it had proceeded against the DECC at the same time and the "costs incurred in two of the three claims would have been avoided if there had been a successful recovery from one of the three defendants". However, the overriding objective relates to management of cases and this evidence does not address why it was not until December 2016 that Solaria even sought to engage with pre-action protocol in a way that led the Department to understand that it might even become a defendant. As it is a defendant which has at all times benefited presumptively from a very short limitation period, the proper course would have been for Solaria to issue a protective claim based upon its actual receipt of only £1.10 per watt and, if appropriate, to then propose a standstill agreement of the kind which was later agreed (albeit in different circumstances) with the Department.

80. Unsurprisingly, the Department says that the chronology of events demonstrates that the cause of Solaria's loss (at least under categories (1) and (2)) was not the Proposal but, instead, GBBS's repudiation of what Solaria says was the conditional agreement to pay at the lower rate per watt only if the Proposal took effect. The Department submits that GBBS' breach of contract was a *novus actus interveniens* which broke any chain of causation between the Proposal and those heads of loss. Although the Department does not seek to have its application determined by reference to the merits of the claim, beyond the A1P1 issue, it contends that the strength of its argument upon the absence of a causal link between the Proposal and the categories (1) and (2) heads of loss is a weighty factor when it comes to considering the suggested merits of Solaria's case in the context of limitation. As this point is one made by reference to Solaria's own actions and pleaded case (about the conditionality of the agreement reached with GBBS) it has considerable force.

81. In that same context, the Department also says, in relation to all three categories of loss, that it has a strong case for saying the DECC was justified in publishing the Proposal when (even though it would have been unlawful to implement it) it was entitled to consult on it and neither the High Court nor the Court of Appeal in *Breyer* made any final determination on justification. Justification would have been an issue for trial in that earlier litigation. However, I do not feel able to form any view upon this aspect of the dispute even for the purposes of exercising the discretion under section 7(5)(b).

82. As for the category (3) head of loss, in respect of Phase 1.2, this was not sought to be recovered by Solaria in its claim against GBBS and there has been no explanation from Solaria as to why the claim to recover that loss from the Department was not brought sooner.

83. I have already referred to the fact that the letter of claim was not sent until 21 December 2016 and the proceedings against the Department were not issued until 21 December 2018. The facts summarised above provide a strong indication that Solaria has begun to believe in the strength of its case based upon the Proposal only in the light of its failure to recover from GBBS and the momentum created by the *Breyer* litigation.

84. The letter of claim prompted the GLD, in its response of 30 January 2017, to refer to the ongoing *Breyer* litigation and to say that any proceedings would be met by a strike out application on the basis that they were time-barred and, in the event of the court extending time, a stay until after judgment in *Breyer*.

85. In the event, the claim was not issued until after the parties had entered into the Standstill Agreement on 21 November 2017 which the Department subsequently brought to an end with effect from 1 March 2018.

86. Mr Adams submitted that it should be sufficient to persuade the court to extend the time for bringing a claim in respect of the Proposal until 21 December 2016, the effective date of the Standstill Agreement. Mr Weisselberg QC did not accept that, saying Solaria had been guilty of further significant delay between 1 March 2018 and the commencement of proceedings on 21 December 2018. He said that there was no good reason for not issuing proceedings by 1 March 2018, notice of the termination of the standstill having been given, and pointed out that it was only on 20 July 2018 that Solaria then proposed a pre-action protocol (during the observance of which it suggested, without effect, that there should be another standstill agreement). The GLD had responded on 2 August 2018 to say that the issue of limitation still remained unresolved and that a "pre-action timetable on the preliminary issue" of limitation should be agreed. It appears that it was only on 7 September 2018 that the parties agreed that proceedings need not be issued while they worked through their protocol on limitation issues. By then 6 months had elapsed from the termination of the Standstill Agreement.

87. I have already mentioned above the two matters upon which Mr Adams relied in seeking to persuade the court to act under section 7(5)(b): the merits of the claim and the need to test the Department's assertion of prejudice occasioned by the delay.

88. However, the real focus of his submissions was directed to a legal argument about the effect of section 7(5). I would summarise his submissions as follows:

1) It is wrong to treat the one year period provided for by section 7(5)(a) as a primary limitation period. A claimant has the legal right to proceed with his claim within that first year but, if he does not, the court has an "unfettered discretion" to permit the claim to be brought at a later point in time.

2) As with other statutory time limits creating a procedural bar, the claimant's cause of action exists whether or not the time limit has expired and any question of limitation is a matter of defence. It is not appropriate to approach the section as if it is within "the discretion of the court as to whether to give the claimant a cause of action" if the year has expired. On the contrary, once issued, even if issued after the one year, the court has a duty to determine the claim properly.

3) No gloss should be put upon the words of the statute and the approach to the exercise of the discretion is one that requires an open-ended examination of factors that weigh on either side of the argument. There should be no ultimate burden upon the claimant to establish that it is "equitable" for the claim to be brought beyond the end of the first year.

4) The section makes it clear that the court is to apply "equitable principles in all the circumstances. This suggests that the exercise is more in the nature of an equitable inquiry, having regard to the circumstances of each party in contrast to it being a matter of legal entitlement which must be proved."

5) Although some of the factors identified as relevant to the exercise of the court's discretion under section 33 of the Limitation Act 1980 may be relevant (that section governs the court's power to disapply the limitation period in personal injury cases where it is "equitable" to do so) they should not be read into section 7(5). The key question relates to the balance of prejudice and, consistent with the court's approach to the defence of laches, mere delay should not be enough. Instead, the defendant must show some prejudice which shows that it is inequitable for the claim to be allowed to proceed. This was something quite different from requiring the claimant to make out special circumstances which justified a departure from the one year period. "As a matter of language and principle, if it is not inequitable for the claim to be allowed to proceed, it is equitable to do so."

6) Expedition on the part of the claimant is less obviously necessary when the claim is for damages against a public authority than it might be if some other remedy is sought against it.

89. In support of the first submission, directed to the width of the court's discretion, Mr Adams relied upon the decision of Sir Terence Etherton MR in *Carroll v Chief Constable of Greater Manchester Police* [2018] 4 WLR 32, at [42], with whom Hickinbottom LJ and Turner J agreed.

90. In support of his third submission Mr Adams relied upon the statement of Lord Kerr in *A v Essex County Council* [2011] 1 AC 280, at [167] who recognised that the "open ended examination of factors" on an application under section 7(5)(b) was such that few cases would be resolved by the application of a burden of proof.

91. The observations of Lady Hale upon the doctrine of laches in *Betterment Properties Ltd v Dorset County Council* [2014] UKSC 7; [2014] AC 1072, at [30]-[31], were relied upon by Mr Adams in support the fifth submission.

92. In support of his submission upon the suggested width of the court's discretion, and what he described as "a general move towards assessing such questions in terms of laches", Mr Adams also drew my attention to the provisions of section 4 of the Inheritance (Provision for Family and Dependants) Act 1975. That section imposes a 6 month time limit for making a claim under the 1975 Act upon the estate of a deceased person, commencing with the date on which the grant of representation was first taken out, but also provides that a later claim may be made with "the permission of the court".

93. I understood the 1975 Act authorities mentioned below to be invoked in support of the first, third, fourth and fifth submissions outlined above. At the hearing, I immediately questioned the relevance of a right to apply for financial provision under the 1975 Act to a cause of action for damages in respect of an unlawful act, to the point of wondering whether the former may properly be described as a "cause of action". In response, Mr Adams said the 1975 Act does create a statutory cause of action.

94. I continue to have real doubts about that assertion. My understanding of a claim under the 1975 Act is that it is very much a personal one which would not survive the death of the applicant before its determination. Moreover, the success of the claim and the value of any award might depend upon a range of factors extending well beyond any broken legal obligation, if any, owed by the deceased to the applicant (the deceased necessarily not himself being the defendant to the claim and the resources and needs of other beneficiaries of his estate being within those factors). But this elementary point was not explored further at the hearing before me.

95. Mr Adams did refer me to the decisions of the Court of Appeal in *Smith v Loosely and other*s 1986 WL 1255554; Briggs J in *Nesheim v Kosa* [2007] WTLR 149 and Mostyn J in *Cowan v Foreman and others* [2019] EWHC 349 (Fam); [2019] 1 FL 1991, each concerning the 1975 Act. After the conclusion of the hearing he forwarded to me the decision of the Court of Appeal in *Cowan v Foreman* handed down on 30 July 2019: see [2019] EWHC Civ 1336. As I understand it, he did so with a view to showing that the court should not exercise its discretion under section 7(5)(b) of the Act as if Solaria had to surmount a number of set hurdles or otherwise in a manner either rigid or too disciplinarian.

96. I indicated to Mr Adams at the hearing that his reference to these authorities under the 1975 Act appeared to be of no real assistance to the issue before me under section 7(5). I have since noted that Asplin LJ in *Cowan v Foreman*, at [48], made the unexceptionable observation that it is necessary to consider a statutory power in the context in which it arises.

97. Whatever their potential significance might be on an application under section 4 of the 1975 Act, Mr Adams' real difficulty lies in trying to shoehorn equitable principles, and specifically the approach of the courts to a defence of laches, into the assessment of factors required under section 7(5). In my judgment they are irrelevant to that exercise. As I remarked at the hearing, the section does not, as he suggested, refer to "equitable principles" but instead to what the court might consider to be equitable when extending the time limit for a claim beyond the one year permitted by the statute. I also reminded Mr Adams that, in any event, one of equity's maxims is that equity aids the vigilant and not the indolent. It is that principle which underpins the doctrine of laches which might operate to bar a claim to *equitable relief* even where the claim is not statute barred: compare section 36(2) of the Limitation Act 1980. A doctrine which potentially applies to preclude the grant of equitable relief in a claim brought within time can be of no assistance in deciding whether a claim for damages should be permitted to be brought out of time.

98. Expressing the point that way brings me to the first and second submissions upon which the others are really built. As I understand all the submissions taken together (but taking the first and second as the key building blocks) they amount to saying that Solaria's claim, brought in December 2018 and not by October 2012, should not really be regarded as statute barred. To the extent it may be so regarded, the court has an unfettered discretion to permit it to be pursued; and, on the question whether that is the "equitable" result, the onus upon the claimant is no greater than that upon the defendant and (if there is no sense of laches) possibly even lighter.

99. In my judgment each of the submissions outlined above reflects a misconception about the meaning and effect of section 7(5), with the possible exception of the last one. As to that last one, the subsection expressly recognises that rules of court may provide for a yet stricter procedural time limit for bringing certain types of claim and so they do for claims for judicial review under CPR 54. But that obviously does not mean that a claim for damages under section 8 of the Act is not subject to the one year time limit. As for the other submissions, and taking account what I have said about the irrelevance of the doctrine of laches, I believe that most of the flaws in them are exposed by the decision of Rix LJ in *M v Ministry of Justice* [2009] EWCA Civ 419 (with whom Lord Neuberger and Bennett J agreed) upon which Mr Weisselberg and Mr Howells relied.

100. It is plain from its language that section 7(5) creates a limitation period of one year and that any other reading of it which is aimed at lessening the impact of that time limit is unsustainable: see *M* at [18] to [22]. As I read it, the reasoning of Rix LJ in *M* scotches any notion that acceding to the Department's application (on the limitation point) would somehow amount to the court improperly depriving Solaria of a viable cause of action, with the issue over its 'equitable' pursuit (after the lapse of one year) being but one component of it to be addressed alongside others, and perhaps only addressed at some later stage in the proceedings. An equitable decision is one that is fair and just to both parties; it is fair to assume that is what the legislative draftsmen in 1980 and 1998 were aiming at with their use of the word "equitable". As with any limitation defence, it is only fair to the defendant that the court addresses the factors that are relevant to any decision to override it (as explained below) at an early juncture and before further significant legal costs are incurred if it is not persuaded to do so.

101. As to the width of the court's discretion, the observations of the Master of the Rolls in *Carroll*, upon which Solaria relies, were directed to the reach of section 33 of the Limitation Act 1980 and whether or not the specific factors identified in section 33(3) placed any fetter upon the court's mandate to have regard to all the circumstances of the case. The conclusion that they did not does not necessarily lead to the further one that the discretion under section 7(5) is therefore wholly unfettered. It is a wide one to be exercised by reference to all the circumstances of the case: see *M* at [25]. Nevertheless, the exercise of it should produce an equitable decision as to whether or not to extend the time beyond one year and, if so, for how long. The words of section 7(5)(b) mean what they say and the court should not attempt to rewrite them: per Thomas LJ in *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, at [30]-[31], and per Lord Dyson in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72, [75].

102. The decision in *Rabone*, at [75] and [108], recognised that, on an application under section 7(5), it will often be appropriate to take into account the type of factors listed in section 33(3) of the Limitation Act 1980. These may include the length and reasons for delay in issuing proceedings; the risk that the delay results in evidence becoming lost or less reliable; and the extent to which the public authority responded to reasonable requests for information once it was made known of the contemplated claim. So far as the length of the delay is concerned, the court is entitled to have regard to the fact that limitation period of only one year under section 7(5) is a clear indication that claims against public authorities should be brought promptly: see *M* at [30]. Mr Adams relied upon statements by Lady Hale in *A v Essex CC*, at [116], and *Rabone*, at [108], to the effect that some such claims for damages against a public authority were akin to claims in tort. However, those statements were made in the context of the court's discretion to extend the period and (regardless of the shorter procedural time limit for judicial review proceedings) the plain fact is that a one year limitation period applies. The concept of delay is one that arises after that year expires.

103. As to who bears the burden of persuading the court to exercise its discretion, I do not read the observation of Lord Kerr in *A v Essex CC* as casting any doubt upon the proposition that the burden does lie with the claimant; quite the opposite in fact given his citation of authority in support of that point. It is clear from the decision of the Court of Appeal in *Dunn v Parole Board*, at [33], that "the presumption has to be that the need to prove that it would be 'equitable' not to apply the limitation provisions rests on those who seek that result" (citing the same authority of *Cameron v Network Rail Infrastructure Ltd* [2007] 1 WLR 163 on section 33 of the 1980 Act). The same point was recognised in *M* at [23]. I fail to see how sub-section 7(5)(b) can read any other way when the proposed defendant has no need to apply for a late claim to be debarred. Section 7 operates to achieve that result unless the claimant can persuade the court otherwise. In the context of section 33 of the Limitation Act 1980, the test has been described as a "balance of prejudice" where the burden is upon the claimant to show that the prejudice to him in not being permitted to sue outweighs that to the defendant in facing a belated claim: see *Carroll* at [42(3)].

104. Mr Weisselberg QC relied upon the decision of the Court of Appeal in *KR v Bryn Alyn Community,* at [74], to say that in such cases the claimant is seeking an "exceptional indulgence" and that the burden upon him is a heavy one. That was a

case under section 33 of the 1980 Act. In my judgment, however, the proper approach of the court, without putting a gloss on section 7(5), is to consider all relevant factors which bear upon the claimant's attempt to persuade the court that it is equitable for the claim to proceed. That was the approach commended by Thomas LJ in *Dunn v Parole Board*, at [32]-[33] and by Lord Dyson in *Rabone* at [75]. However, as Mr Weisselbeg submitted by reference to the decision of Thomas LJ, there may be cases where the claimant's delay alone is sufficient to undermine the application even where there is no evidence of resulting prejudice to the defendant. I am stating the obvious in saying that outcome is more likely when the delay is lengthy and it, or a significant part of it, is unexplained: compare section 33(3)(a) of the 1980 Act.

105. It follows from my analysis of the authorities which bear upon section 7(5) that it is Solaria's submissions which involve putting a gloss on the language of the statute. When considering the two points on the merits (on the limitation aspect) upon which Mr Adams relied – see paragraph 72 above – it becomes immediately apparent that Solaria has offered no good reasons for a period of delay almost five times longer than the one year permitted by the statute (ignoring the period covered by the Standstill Agreement). The pursuit of a truly alternative claim against GBBS, over just under a year of that overall period of delay, cannot constitute a good reason. Solaria seeks to analyse the attempted recovery from GBBS as an exercise in mitigating its loss for the purposes of the present claim but that cannot be supported in circumstances where it did not even intimate a claim against the DECC or the Department and where, on its own case, any recovery from GBBS would have been *because* the Proposal had not operated to interfere with its contractual rights. I have already observed that the facts clearly indicate that Solaria gave no real thought to suing the Department over the suggested effect of the Proposal until the prospect of recovery from GBBS had disappeared and then did not take the step of actually issuing proceedings until the *Breyer* litigation had advanced almost to the point of trial.

106. The failure to bring proceedings over the Proposal before the effective date of the Standstill Agreement (namely 21 December 2016 when the letter of claim was sent) clearly has prejudiced the Department. Within weeks of the Proposal being published Solaria knew of the legal challenge to its proposed implementation. If Solaria had acted promptly by looking to the DECC for the loss that had in fact resulted from it receiving from GBBS the lower rate of £1.10 per watt for PV panels (even if that should not have been the legal consequence of its agreement with GBBS) its claim could have been managed alongside the ones in *Breyer*.

107. As things now stand, however, the Department would be faced with the prospect of the evidential and financial implications of a claim commenced only at the conclusion of the *Breyer* litigation. I accept Mr Weisselberg's submission, which is supported by the evidence from Mr Olsen of the GLD, that the evidential difficulties would not only reflect the inevitable consequences of further fading memories on the part of those behind the publication of the Proposal but also the difficulties likely to be encountered in disentangling the effect of the Proposal from a falling market in PV installations caused by the revised one which took effect, without challenge, whilst Solaria continued to supply GBBS. As to that, I have already referred to the apparent strength of the Department's likely defence based upon GBBS's *novus actus*. Yet the

Department would be expected to attempt to adduce evidence from the officers or representatives of GBBS, to explore the reasons why Solaria were not paid the full £1.35 per watt, when that company went into administration over 4 years ago. Mr Olsen also makes the incontrovertible point (which chimes with what Rix LJ said in *M*) that bringing this very late claim is at odds with the public policy objective of encouraging the efficient use of public resources which I believe I am entitled to assume was in the Department's mind when reaching its settlement with the *Breyer* claimants.

108. In my judgment Solaria offers no real case for persuading the court that it would be equitable to permit it to bring a claim so many years after the Proposal was made. Even if Solaria had been able to establish a realistic claim to unlawful interference with an A1P1 possession, I would nevertheless have granted the Department's application on the basis that such proceedings are statute barred.

Disposal

109. I therefore grant the Department's application and, subject to any further representations from the parties, propose to dispose of it on the basis that the Department is entitled to summary judgment against Solaria.

110. As I intend to hand down this judgment in the absence of the parties, the procedure identified in *McDonald v Rose* [2019] EWCA Civ 4, [21], will apply to any intended appeal by Solaria. I therefore invite the parties to agree a minute of order which will provide for a timetable for filing written submissions in support of an application for permission to appeal, and then the Department's written submissions in response, in the event of Solaria indicating by its solicitors' letter to the court, prior to the handing down of this judgment, that it wishes to appeal. In that eventuality, I will determine the application on paper in the light of the submissions filed by the parties.