Neutral Citation Number: [2023] EWHC 2921 (TCC)

Case No: HT-2023-000018

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

Rolls Building, Royal Courts of Justice
Strand, London, EC4A 1NL

Date: 17/11/2023

Before:

MR MARTIN BOWDERY KC

- -

Between :

BROOKHOUSE GROUP LIMITED	**Claimant**
- and -	
LANCASHIRE COUNTY COUNCIL	**Defendant**

- -
- -

Tim Buley KC and James Neill (instructed by **DLA Piper UK LLP**) for the **Claimant**
Rhodri Williams KC and Tom Walker (instructed by **Lancashire County Council**) for the **Defendant**

Hearing dates: 17th October 2023

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JUDGMENT

This Judgment is set out in 7 parts:

1. INTRODUCTION

1. The parties dispute concerns the Cuerden Strategic Regional Investment Site ("CSRIS"). This comprises 65 hectares of land. The Defendant owns some 71% of the CSRIS whilst the Claimant owns some 29%.

2. The Claimant's claim arises out of the award of a contract by the Defendant to a developer, Maple Grove Developments Limited ("MGD") and entry into that contract by MGD and the Defendant on the 29 July 2022 ("the DA").

3. The Defendant contends that the DA contains enforceable obligations on the part of MGD to carry out development works at CSRIS falling within the scope of a procurement contract competitively tendered and awarded to Eric Wright Group Limited ("EWG") – which owns MGD – on the 6 December 2012 and within the Strategic Partnership Agreement ("SPA") subsequently entered into with EWG on the 20 December 2012.

4. The Defendant further contends that the SPA constituted a framework contract which expressly and lawfully envisaged and provided for the Defendant entering into further project specific development agreements either with the chosen developer (EWG) or with its nominated Partnering or Project Services Provider (MGD) without any

further competitive tendering requirements. The Defendant claims that the entering into the DA with MGD constituted the lawful execution of the specific provisions of the SPA for the relevant project, namely the development of the Defendant's land within the CSRIS.

5. The DA is a public works contract and/or a mixed public works and services contract for the purposes of the Public Contract Regulations 2015 ("PCRs")

6. The Claimant claims in their proceedings a declaration of ineffectiveness pursuant to regulation 98(2) of the PCRs declaring void the provisions of the DA.

7. It appears common ground:

   i) that the DA contains enforceable obligations on the part of MGD to carry out development works on the Defendant's land at the CSRIS.

   ii) that prior to the award of the DA there was no separate contract award notice issued in relation to the contract.

8. The Defendant in their Defence set out a defence based upon limitation. The Defendant contends that the Claimant was provided with a "summary of the relevant reasons" for the purposes of Regulation 93(5) of the PCRs at the latest by the 22 September 2023 and therefore any claim had to be filed within 30 days of that date ("the Limitation Defence") and the thirty day time limit for starting proceedings ran from that date and expired on the 24 October 2022.

9. The Claim Form in the present proceedings was issued on the 20 January 2023 nearly four months after the relevant date and well outside the thirty-day time limit. Accordingly, the Defendant contends that the claim is statute barred in its entirety pursuant to regulation 93(2)(a) of the PCRs. It is also alleged by the Defendant that the Court has no discretion to extend the applicable time limit under regulation 93.

10. The Claimant contends that the success or failure of the Limitation Defence turns on a short question of law whether in circumstances in which no competitive tendering

exercise under the PCRs has been held by a contracting authority can the contracting authority still rely upon regulation 93(5) by providing reasons to any economic operator as to why no competitive award procedure has been carried out.

2 THE APPLICATION

11. The Claimant's application dated 12 April 2023 seeks the following order:

> That paragraphs 21 - 25 (inclusive) of the Defendant's Defence be struck out pursuant to Civil Procedure Rules ("CPR") 3.4.(2)(a) on the basis that they disclose no reasonable grounds for defending the claims against the Defendant.

12. The Defendant's application dated the 27 April 2023 seeks an order:

> To strike out the Claimant's claim in its entirely pursuant to CPR r. 3.4(2)(a) on the basis that it discloses no reasonable grounds for bringing the claim against the Defendant.
>
> Alternatively for summary judgment pursuant to CPR r. 24.2(a)(2) on the basis that the Claimant has no real prospect of succeeding on the Claim.

3 THE CHRONOLOGY OF EVENTS

DATE	DETAIL
The Strategic Partnering Agreement	
2011	The Council acquired an interest in the CSRIS
November 2011	A Prior Information Notice in the OJEU was published (ref. 2011/S 217-353851) in respect of the regeneration of the CSRIS
8 March 2012	The Council commenced a competitive tender procedure in respect of the development of the CSRIS

	by publishing a Contract Notice in the OJEU (ref. 201S 47-077170). This competition was also advertised on the Council's website.
30 April 2012	Brookhouse wrote to the Council to express its interest in the competition.
21 May 2012	The Council responded to Brookhouse's expression of interest. As the deadline for receipt of requests to participate was 10:00am on 12 April 2012, the Council stated that it was unable to consider Brookhouse as part of the tender process.
6 December 2012	Following the conduct of the competitive dialogue procedure by the Council, two contracts were awarded. The second of these, the SPA, was awarded to EWG.
20 December 2012	The Council entered into the SPA with EWG.
7 January 2013	A Contract Award Notice in respect of the SPA was published in the OJEU (ref2013/S -02633).
The Development Agreement	
2019	Brookhouse and the Council attempted to agree on heads of terms for an agreement relating to the development of the CSRIS,
15 January 2020	Shoosmiths, on behalf of the Council, explained that the Council's preference was to use the SPA to enter into a development agreement with EWG.
15 February 2021	In response to a freedom of information request by Brookhouse for details of each development contract awarded using the SPA with EWG, the Council provided Brookhouse with the details of 11 such projects. This included one in relation to the CSRIS.

29 July 2022	The Council entered into the DA with MGD, a wholly owned subsidiary of EWG, pursuant to the SPA.
3 August 2022	The Council notified Brookhouse that it had entered into the DA with MGD.
2 September 2022	A press release was issued announcing that the Council had submitted an application for planning permission for the development of the CSRIS.
2 September 2022	The Council sent a letter to Brookhouse confirming that planning permission for the development of the CSRIS had been submitted.
Procedural History	
8 September 2022	Brookhouse sent a detailed letter before claim to the Council. This confirmed that it was aware of the Council's press release concerning the development of the CSRIS.
22 September 2022	The Council provided its response to the letter before claim. This confirmed the conclusion of the DA and provided Brookhouse with a detailed summary of the reasons why the Council was entitled to enter into the DA by the execution of the provisions of the SPA without conducting any further competitive tender processes.
21 December 2022	A draft Particulars of Claim was provided to the Council by Brookhouse.
22 December 2022	The parties agreed a confidentiality agreement under which redacted versions of the SPA and the DA were provided to Brookhouse.

20 January 2023	Brookhouse's Claim was issued.
16 February 2023	The Council served its Defence.
8 March 2023	Brookhouse served its Reply to the Defence.
The Strike Out Application	
8 March 2023	Brookhouse invited the Council to withdraw the limitation argument set out in paragraphs 21-25 (inclusive) of the Defence.
14 March 2023	The Council declined Brookhouse's invitation to withdraw its limitation argument.
12 April 2023	Brookhouse issued its Strike Out Application.
The Cross Application	
27 April 2023	The Council issued its Cross-Application to strike out Brookhouse's claim in its entirety.

4 PARAGRAPHS 21 TO 25

13. The paragraphs of the Defence which are at the core of both the Claimant's and the Defendant's applications are:

> "Limitation
>
> [21] The claim is brought under the Public Contracts Regulations 2015 ("the 2015 Regulations"). The allegation at paragraph 43(1) - (4) is that on 29th July 2022 the Defendant entered into a public works contract with MGD without: (i) applying the procedure set out in Part 2 of the 2015 Regulations contrary to regulation 26(1); (ii) publishing a call for competition in accordance with Part 2 contrary to regulation 26(2); (iii) publishing a contract notice containing the information set out at regulation 49; and (iv) submitting such a notice in accordance with regulation 51. The Claimant therefore alleges that the first ground of

ineffectiveness under regulation 99(1) applies and claims a declaration to this effect.

[22] Regulation 93 of the 2015 Regulations provides:

"[93] Special time limits for seeking a declaration of ineffectiveness

(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started-

(a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;

(b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published on the UK e- notification service, in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose a contract award notice is relevant if, and only if,
(a) the contract was awarded without prior publication of a contract notice; and
(b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of:

(a) the conclusion of the contract, and

(b) a summary of the relevant reasons, in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), "the relevant reasons" means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

[23] Shortly after the 29 July 2022, the Defendant published a press release on its website announcing that it had entered into the DA with MGD. By no later than 8th September 2022 when the Claimant wrote a detailed letter before claim, the Claimant was aware of this fact. Furthermore, insofar as it was not aware of the same by virtue of the previous correspondence between the parties in 2020 and 2021, by no later than 22nd September 2022 when the Defendant responded to the letter before claim, confirming the conclusion of the DA, the Claimant was also made fully aware, by way of a detailed summary, of the reasons why the Defendant was entitled to enter into the DA by execution of the provisions of the SPA without conducting any further competitive tender process.

[24] In the circumstances, at the very latest by 22 September 2022, the Defendant had informed the Claimant of the conclusion of the DA and provided it with a summary of the relevant reasons for that, with the result that the relevant date, for the purposes of regulation 93(5) of the 2015 Regulations, was no later than 23 September 2022 and the thirty day time limit for starting proceedings ran from that date and expired

on 24 October 20225.

[25] The Claim Form in the present proceedings was issued on 20th January 2023, nearly four months after the relevant date, and well outside the thirty day time limit, with the result that the claim is statute barred in its entirety, pursuant to regulation 93(2)(a) of the 2015 Regulations. Nor does the Court have any discretion to extend the applicable time limit under regulation 93."

14. For the sake of completeness, the Claimant's response to the Limitation Defence is set out in paragraphs 13 and 14 of the Reply which states:

"[13] As to paragraph 23, save that it is admitted that on 22 September 2022 the Council purported to give reasons why it considered it was entitled to enter into the DA without conducting any further competitive tender process, it is denied that the reasons given in that letter (which was a response to the Claimant's letter before action) constitute valid reasons for not conducting a competitive tender process prior to the award of the MGD Agreement. The reasons given in that letter, which were to the effect that the SPA was "awarded as, and consists of, a public works contract, albeit in the form of a framework contract and that its scope is clearly wide enough to incorporate the development of the CSRIS" were both inconsistent with the Defendant's case as now pleaded (which does not assert that the SPA was a public works contract) and is in any event flawed for the reasons set out in the Particulars of Claim.

[14] As to paragraph 24, it is denied that the explanation that the Defendant purported to provide in its letter of 22 September 2022 or at any earlier stage constituted a summary of the relevant reasons for the purposes of regulation 93(5):

(1) "Relevant reasons" are defined in Regulation 93(6) as "the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55 (2)";

(2) Regulation 55(2) refers to responses to written requests from candidates or tenderers and specifies at Regulation 55(2)(a) - (d) the information to be provided to unsuccessful candidates or tenderers. Therefore Regulation 55(2) only applies where there has been a competitive tendering process carried out. It plainly does not apply to a situation where, as occurred here, no competitive tendering process has been carried out at all before the DA was awarded and entered into.

(3) Therefore no "relevant reasons" could have been or were provided by the Defendant. Accordingly, the assertion that the relevant date was 23 September 2022 and that the time limit was 30 days which ran from that date and expired on 24 October 2022 is misconceived. The applicable time limit was that specified under Regulation 93(2(b), ie. 6 months beginning with the day after the date on which the contact was entered into (ie. 30 July 2022). The claim was filed on 20 January 2023 well within this time limit. Paragraph 25 is accordingly denied."

5 THE REGULATIONS

15. The PCRs have at all relevant times been in force and remain in force because they are "Retained EU Law" pursuant to sections 2(1) and 6(7) of the European Union (Withdrawal) Act 2018.

16. The Claimant submitted that their case was simply contained in regulation 55 but that it was necessary to look more widely at the regulations and the structure of the regulations.

17. I doubt whether this was strictly necessary but the relevant regulations to the two applications are:

[2] – Definitions

i) “"candidate" means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership;

ii) “economic operator" means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works • or a work, the supply of products or the provision of services on the market·

iii) "tenderer" means an economic operator that has submitted a tender;”

[26] Choice of procedures: General

(1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part [...]1, except where regulation 32 permits contracting authorities to apply a negotiated procedure without prior publication.

(8) Calling for competition etc
[The] call for competition shall be made by means of a contract notice in accordance with regulation 49.

[55] Informing candidates and tenderers

(1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract

or admittance to a dynamic purchasing system, including the grounds for any decision-

(a) not to conclude a framework agreement,

(b) not to award a contract for which there has been a call for competition,

(c) to recommence the procedure, or

(d) not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform-

(a) any unsuccessful candidate of the reasons for the rejection of its request to participate;

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 42(14) and (15), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

[86] Notices of decisions to award a contract or conclude a framework agreement

(d) precise statement of either-

(i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or

(ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement.

[7] Meaning of "candidate" and "tenderer"
In this regulation,-

(a) "candidate" means a candidate, as defined in regulation 2(1), which-

(i) is not a tenderer, and

(ii) has not been informed of the rejection of its application and the reasons for it;

(b) "tenderer" means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.

[87] Standstill period

(2) Where the contracting authority sends a regulation 86 notice to all the relevant economic operators by facsimile or

electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

[88] Interpretation of Chapter 6

"contract", except in regulation 103, means a public contract or a framework agreement;
"declaration of ineffectiveness" means a declaration made under regulation 98(2)(a) or 103(3);

[91] Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

[92] General time limits for starting proceedings

(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:-

(a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with-

(i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

(ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

[93] Special time limits for seeking a declaration of ineffectiveness

(2) Such proceedings must be started-

(a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;

(b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published [on the UK e-notification service] , in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose, a contract award notice is relevant if, and only if:

(a) the contract was awarded without prior publication of a contract notice; and

(b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority was informed the economic operator of-

(a) the conclusion of the contract, and

(b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), "the relevant reasons" means the reasons which the economic operator would/ have been entitled to receive in response to a request under regulation 55(2).

[97] Remedies where the contract has not been entered into

(1) Paragraph (2) applies where-

(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and

(b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following-

(a) order the setting aside of the decision or action concerned;

(b) order the contracting authority to amend any document;

(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

[98] Remedies where the contract has been entered into

(2) In those circumstances, the Court-

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;

(c) must, where required by regulation 102, impose penalties in accordance with that regulation;

(d) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);

(e) must not order any other remedies.

[99] Grounds for ineffectiveness

(2) The first ground

Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply:-

(a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;

(b) the contracting authority has had published [on the UK e-notification service] a voluntary transparency notice expressing its intention to enter into the contract; and the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published on the [UK e-notification service].”

(4) In paragraph (3), "voluntary transparency notice" means a notice [...] which contains the following information-

(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;

(6) The second ground

The second ground applies where all the following apply- ·

(a) the contract has been entered into in breach of any requirement imposed by-

(i) regulation 87 (the standstill period),

(ii) regulation 95 (contract-making suspended by challenge to award), or

(iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);

[101] The consequences of ineffectiveness

(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing-

(a) the implications of paragraph (1) or (2) for the particular circumstances of the case;

(b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

6 THE RELEVANT LEGAL PRINCIPLES

18. As to the test to be applied on a strike out application concerning limitation the Defendant refers to the Court of Appeal decision in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA 156 at (4) which adopted Mann J's formulation at first instance which stated:

"The outline issues and the nature of this hearing

[14] The main basis on which GMWDA seeks to strike out this case, or seeks summary judgment, is that these proceedings have been commenced outside the limitation period provided for by reg.32(4)(b). It says that Sita knew or ought to have known of the infringements by a date which was, at the latest, April 8, 2009, so that proceedings ought to have been commenced by July 7, 2009, subject to limited agreed extensions which do not, in the event, assist Sita. It also says that Sita has not established any case for the exercise of any discretion to extend allowed by the Regulation. Sita claims that it has commenced its claim in time, or at least that it is not sufficiently clear at this stage that it has not; and insofar as necessary invites me to exercise the discretion to extend.

[15] A consideration of these issues, on the facts of a case such as this, is not a straightforward matter of considering the effect of some uncontested or incontestable evidence. It involves construing the Regulation, considering the effect of a very recent European authority, considering a number of other authorities, and then analysing the disclosed events relating to a negotiation to which Sita was not, for the most part, a party. For GMWDA to succeed it would have to establish not merely some facts, but also what Sita knew about those facts. That last element inevitably makes the inquiry more difficult. There is a possible alternative of what Sita *ought* to have known. That is potentially a more difficult inquiry still. I have referred to the scope of the documentary and witness statement evidence before me.

[16] In those circumstances it is not surprising that Sita has deployed what I might call the usual authorities about the undesirability, or even impropriety, of having mini-trials at an early stage of proceedings on applications for summary judgment or to strike out, where material facts are disputed and the law is not straightforward. I will not lengthen this judgment by citing the detail of that authority; the cases were *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2004]P.N.L.R. 35; *Barrett v Enfield LBC* [2001] 2 A.C. 550; [1999] 3 W.L.R. 79 HL; *Intel Corp VIA Technologies Inc* [2002] EWCA Civ 1905; [2003] E.C.C. 16; and *Bridgman v McAlpine Brown* [2000] LTL Jan 19, 2000 (CA). I accept that a claim should not be struck out unless it can be demonstrated sufficiently clearly that it is bound to fail, as a matter of law and/or fact, and that I should not determine a serious live issue of fact which requires oral evidence, or which requires the full scrutiny that a trial will bring to bear.

[17] For its part, GMWDA deployed dicta in *Three Rivers DC v Bank of England* (No.3) [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220; [2000] 3 C.M.L.R. 205 HL; and *Swain v Hillman* [2001] 1 All E.R. 91; [2001] C.P. Rep. 16 CA (Civ Div), the latter referring to the merits of a summary judgment in giving the quietus to a case which it appears

sufficiently clearly is bound to fail. It saves court resources and enables the parties to know where they stand.

[18] I bear all these points firmly in mind. The real question for me is whether it is clear enough, at this stage, that the claim is bound to fail on limitation grounds, and that a trial (or a fuller hearing of a preliminary issue) would not change that situation. Any doubt about it would have to be resolved in favour of the claimant. When I make any determination in this matter whether of fact law or discretion, I should be taken to be doing so on the footing that the point has been clearly established, and that the same result would clearly be reached at a trial.

The Claimant referred to Mrs Justice Asplin's (as she then was) decision in *Tesco Stores Ltd v. Mastercard Incorporated* [2015] EWHC 1145 (Ch) where she stated:

"The Court's approach to applications under CPR Parts 3.4 and 24

[9] The relevant principles on applications under CPR Rule 3.4(2) to strike out statements of case and under Rule 24(2)(a)(i) for summary judgment are well known and are not controversial. On an application to strike out it is necessary to decide whether the whole or a material part of the Statement of Case discloses no reasonable grounds for bringing the claim. One of the most recent summaries of the relevant principles applicable on an application for summary judgment is contained in the judgment of Simon J in *Arcadia Group Brands Ltd & Ors v Visa Inc* [2014) EWHC 3561 (Comm) at [19). He referred to the much quoted summary of the relevant principles found in the judgment of Lewison J (as he then was) in *Easy Air Limited v Opal Telecom Limited* [2009} EWHC 339 (Ch) and in addition went on:

" ... For present purposes it is sufficient to identify 8 points which are of potential relevance to the present applications.

i) The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v. Hillman* [2001] 1 All ER 91, 92.

ii) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003) EWCA Civ 472 at [8].

iii) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence: *Swain v. Hillman* (above) at 95.

iv) The Court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17).

v) In reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brampton Hospital NHS Trust v. Hammond (No. 5)* [2001) EWCA Civ 550 at [19).

vi) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012) 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory

application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116).

vii) The overall burden of proof remains on the Defendants,

> ... to establish, if it can, the negative proposition that the [Claimants have] no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial,

see *Apvodedo NV v. Collins* [2008] EWHC 775 (Ch), Henderson J at [32].

viii) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see: *Miles v. Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were grounds for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v. Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56]."

[10] I was also referred to the recent summary of the principles in the dicta of Floyd LJ in T*FL Management Services Ltd v Lloyds Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006, at [26]-[27]. At [26] Floyd LJ set out the approach set out by Lewison *J* in *Easy Air Limited v Opal Telecom Limited*. In particular, Lewison J's sixth and seventh principles set out at [26] and the dicta at [27] are relevant here:

"….

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real,

> as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may tum up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

> [27] Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* (2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example Hudson and others and *HM Treasury and another* [2003] EWCA Civ 1612."

19. I will bear all these points firmly in mind when considering the parties' respective applications.

7. CONCLUSIONS

20. The Defendant makes four principal submissions:

.1 An analogous argument, it is alleged, was expressly rejected albeit obiter in *Alstom Transport v. Eurostar International* [2011] EWHC) 1828 (Ch).

In proceedings under the Utilities Contract Regulations ("UCRs") a 30 day cut-off period was applied by Mr Justice Mann as a reason to strike out a claim for a declaration of ineffectiveness. However, in that case Alstom was a tenderer. A competition had been held and Alstom had been unsuccessful. Here in this case the Claimant was neither a tenderer nor a candidate.

21. The observations of the Judge in *Alstom* at paragraph 69 I consider are applicable to the facts of this case:

> "Regulation· 33 is about the provision of necessary information. It applies when a decision has been made to award "the contract". That contract is, in my view, the contract which the utility has been telling the relevant commercial world it is minded to enter into and is the contract which apparently conforms to the "proposed contract" for which it called for competition under the regulation 16 mechanism (in this case). The "tenderers and candidates" referred to are those who were tenderers and candidates for that contract. That is the effect of the definitions contained in paragraph (14). The provision of such information is a vital part of the control mechanism under the Regulations. Tenderers and candidates are entitled to assume that once they are part of the process, they will get the information referred to in regulation 33(2). The regulation makes linguistic and commercial sense if it is construed in that way."

22. Mann J refers to the equivalent provisions in the UCRs to Regulation 93(5) which in turn refers to Regulation 55 of the PCRs and makes it clear that Regulation 93(5) only applies:

    i) where a competition has been carried out

    ii) Alstom was a tenderer

iii) where the reasons for rejection are provided to an unsuccessful tenderer or candidate;

Mann J was limiting Regulation 33 UCR to candidates and tenderers.

.2 The Defendant also contends that the Claimant in referring back to Regulation 55 confuses the recipient of the relevant information with the adequacy of the content of that information.

23. I disagree. The provision of such information is for tenderers and candidates as explained by Mr Justice Mann in *Alstom*. The Defendant seeks to distinguish the effect of his decision by taking what I consider were two bad points:

i) On 29th July 2022 the Defendant entered into the DA with MGD, a wholly owned subsidiary of EWG so this was an appointment under the December 2012 SPA. However, the Defendant accepts that that contract was a public works contract and not a framework agreement. The Defendant classifies it as a framework contract, but no such concept is recognised by the Regulations. Furthermore, there is nothing which happened since 2012 which made the Claimant a tenderer or a candidate.

i) The Defendant contends that a would-be candidate whatever that means is sufficient to engage Regulation 55. However, the PCRs seek to impose a comprehensive code for public procurement and nowhere in those regulations is a would-be candidate referred to or is defined.

.3 The Defendant contends that the Claimant's construction of Regulation 93(5) produces illogical consequences**.**

24. I disagree.

i) First, looking at Regulation 93, the intention of the legislator is to

impose a 6-month time limit (which is the long stop position) and in some other cases, 30 days;

ii) Where are the cases where a shorter time limit is imposed? Where the Contracting Authority has taken steps to put the putative challenger on notice that a 30 day limit will apply;

iii) Regulations 93(3) and 93(5) are expressly dealing with a particular kind of case - where challengers have been put on notice by the contracting authority;

iv) Impose a 6 month time limit and to allow Contracting Authorities to give a shorter time limit - either by complying with 93(3) or 93(4) - ie. they could have published a contract award notice;

v) Counsel for the Defendant submitted that the reason the Defendant did not publish a contract award notice is because it would be a "red rag to a bull". That may be right but that is the whole point of the contract award notice. It is to put the potential challengers on notice and accordingly to have a shortened time period for bringing a claim;

vi) It is not illogical to impose a 6 month limitation period as a long stop position.

.4 The Defendant alleges that the Claimant's submission that Regulation 93(5) is not available in the present case is contrary to the purpose of Regulation 93.

25. The Defendant in their written submissions referred me to the following passages in Arrowsmith's The Law of Public and Utilities Procurement, 3rd Edition:

"[22-93] It allows Member States to make available to their contracting authorities a method of shortening the period

> for challenge by informing economic operators or potential economic operators of the relevant decision, either directly or through a contract award notice, as appropriate. In this way contracting authorities can avoid the risk of a contract being challenged for ineffectiveness for six months after it is entered into and limit that risk to a 30-day period from the time of the notification."

26. Which includes

> "In this regard, Remedies Directive Art.2f(1) provides that Member States must give at least 30 calendar days to challenge the decision. However, this time period can only begin to run in the following situations - effectively when those concerned with the decision have had a chance to find out about it.
>
> This possible 30-day period applies, first – relevant the case in which no call for competition was published - where the contracting authority has published a contract award notice in accordance with the 2014 Public Procurement Directive or the Concessions Directive, as applicable, which in includes justification of why the contract was awarded "without prior publication of a contract notice in the Official Journal of the European Union". In this case the 30 day period runs from the date after publication of the compliant award notice.
>
> A second situation in which a 30-day period may be provided for, relevant to award procedures conducted after a call for competition, is where ineffectiveness arises from violating certain rules on standstill or suspension, when the contracting authority has informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons for its decision as set

> out in 2014 Public Procurement Directive Art.55(2) or Concessions Directive rt.40(1), as applicable. In this case the 30 calendar day time-limit commenced with effect from the day following the date on which the contracting authority informed the tenderers or candidates concerned."

27. Here Professor Arrowsmith identifies two routes to shorten the limitation periods to 30 days. Absent these two routes the longstop of 6 months applies.

28. Here the words of the Regulations are clear and unambiguous and do not produce obscurity.

29. Applying orthodox principles of interpretation restated recently by Lord Hodge in *R(O) v. SSHD* [2023] AC 255 at [29] – [30] where he said:

> "[29] The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [I975] AC 59I, 6I3 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." *(R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [200I] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for

having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

[30] External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation,* 8th ed (2020), para II.2. But none of these external aids displace the meanings conveyed by the words of a statute • that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the I98I Act and the 2014 Act should be read as a whole."

the language of the PCRs is clearly unambiguous and certain.

30. The shorter time limit in Regulation 93(2)(a) will apply where:

a) Regulation 93(3) applies where the contracting authority publishes a contract award notice.

b) Regulation 93(5) applies which means that the economic operator has been given reasons not only of the conclusion of a contract but also "the relevant reasons";

c) These can only be by virtue of Regulation 93(6) the reasons to which the economic operator was "entitled" under Regulation 55(2);

d) Regulation 55 only applies where:

i) A contract has been awarded pursuant to a competitive tender procedure in accordance with the PCRs, so as to engage the obligation on the contracting authority under reg 55(1);

(ii) A "candidate" or "tenderer" within the meaning of reg 2 as defined above has requested reasons in accordance with reg 55(2);

(iii) The reasons requested must relate to one of the four matters specified in reg 55(2) which are quite specific;

(iv) Reasons relating to those matters need to have been provided, so as (inter alia) to start time running under reg 93(5).

31. The reasons relied upon by the Defendant are the reasons set out in its letter dated 22nd September 2022 as to why no competition at all was conducted for the Contract in question. Those reasons:

    a) were not requested by a tenderer or a candidate and were not given to a candidate or a tenderer. This in itself is fatal to the Limitation Defence.

    b) do not on any analysis constitute a summary of the relevant reasons for the purpose of reg 55(2) of the PCRs. It is simply a written response to the Claimant's letter before claim. The Defendant's response does not contain any information that relates to any of the matters specified in reg 55 (2).

32. I am satisfied that the Limitation Defence relied upon and pleaded by the Defendant at paragraphs 21 to 25 of the Defence discloses no realistic grounds for defeating the claim and should be struck out and the Defendant's counter application for strike out and summary judgment should be dismissed.

33. I would ask the parties to draw up and agree to a suitable order.

MARTIN BOWDERY KC
(Sitting as a Deputy High Court Judge)
17th November 2023