Neutral Citation Number: [2019] EWHC 1230 (Admin)

Claim No: CO/1697/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEENS BENCH DIVISION**
**ADMINISTRATIVE COURT**

Date: 20 May 2019

Before:

**MR JUSTICE WAKSMAN**

**KENSON CONTRACTORS (BENINGTON) LIMITED** **Claimant**

**- and -**

**LONDON BOROUGH OF HARINGEY** **Defendant**

**- and -**

**MARLBOROUGH HIGHWAYS LIMITED** **Interested Party**

**Hearing date: 8 May 2019**

Fergus Randolph QC (instructed by Tiger Law, Solicitors) for the Claimant

Ewan West (instructed by Haringey Council Legal Service) for the Defendant

Stephen Kosmin (instructed by CMS Cameron McKenna Nabarro Olswang LLP, Solicitors) for the Interested Party

# APPROVED JUDGMENT

## INTRODUCTION

1. This is an application made by the Claimant contractor, Kenson Contractors (Benington) Limited ("Kenson") for an interim injunction against the Defendant, the London Borough of Haringey ("the Council") to suspend its decision to award or execute a road-improvement contract to the Interested Party, Marlborough Highways Limited ("MHL"). Kenson came second in the procurement exercise for that contract and MHL came first. Because of the value of the contract (some £630,000 plus VAT) this procurement exercise was well below the threshold for the operation of the otherwise relevant parts of the Public Contracts Regulations 2015 ("the PCR") which is currently about €5.548m.

2. The hearing of this application took place on 8 May. Because of the urgency in this case, I informed the parties on the day after the hearing of my decision, which was that the application for the injunction would be refused. I gave a summary of my reasons which would then be set out in detail in a full judgment to follow. This is that judgment. There were some parts of the evidence which have been agreed for present purposes to be confidential so far as disclosure within this judgement is concerned. They are set out in a confidential annexe ("the Confidential Annexe") which may be read only by the parties' lawyers, subject to any further order.

3. The underlying claim is brought by way of judicial review ("JR") of the Council's decision to award the contract to MHL rather than Kenson. This was communicated to the parties by letters dated 27 March 2019, although the minutes of the Council's Cabinet meeting which approved the award on 12 March were published on its website on 19 March. Kenson could have discovered that it had come second, because while the identity of the winning bidder was not disclosed, Kenson would have seen that the amount of the contract price was not the same as its tender price, indeed significantly more, and would therefore have known that it had lost the bid.

4. The question of whether permission should be granted for this claim is not before me. Indeed, the time for service of the acknowledgments of service ("AOS") from MHL and the Council has not yet expired.

## PROCEDURAL HISTORY

5. At this stage I note only that the claim form was issued at the Administrative Court on Thursday 25 April and on an urgent basis. On the same day, and on the basis of the papers submitted to him by Kenson, Murray J, made an order on paper, giving directions as to an expedited hearing. He ordered that there be an urgent oral hearing to take place on Wednesday 1 May, to be on notice to the Council and MHL. That hearing in fact took place on 2 May before Fraser J who adjourned the case, with directions for short service of evidence from the Council (MHL having served its evidence prior to the hearing on 2 May 2019) until 8 May when it came on before me. He also ordered Kenson to serve evidence so as to identify the last three attachments of an email sent by Ms Challess of Kenson's solicitors on 25 April and to explain why the order of Murray J was not emailed to the other parties until 26 April.

6. What Kenson had emailed to the Council on 25 April were copies of the Claim Form, Particulars of Claim, the Statements of Facts and Grounds and the application for interim relief. These were emailed to Mr Barry Phelps, Head of the Council's Procurement Team,

although for reasons dealt with later, he did not open or read it until Monday 29 April. Kenson also emailed the documents to Mr Nana Penseh, the procurement lead for the Council on this exercise; however they used an incorrect email address for him even though there had been email exchanges with him previously.

7. It is correct to add, however, that hard copies of the documents emailed on 25 April were also couriered to the Council and it seems they were delivered on Friday 26 April although it is not clear to whom at the Council, who signed for them or where they were sent on that day, because there is no evidence about that. So far as MHL is concerned, what was emailed and couriered to it were the Claim Form, Particulars of Claim and the application for injunctive relief but not the Statement of Facts or Grounds.

8. Pursuant to the order of Fraser J, there is now the substantive witness statement of Mr Phelps in answer to this claim dated 7 May. There is also the further witness statement of Ms Challess dated 3 May 2019. That is further to her first, substantive statement dated 25 April. There is also the witness statement of Mr Joseph Revell dated 1 May. He is a director of MHL and was part of the management team responsible for supervising the preparation of MHL's bid.

## THE CONTRACT WORKS

9. These consisted of road improvement works to Chesnut Road, Tottenham, London N17. This is a key route between Tottenham Hale tube and overground station, and Tottenham Hotspur's recently opened new stadium. The works are considered by the Council to be necessary in order to provide critical public access to the stadium as well as helping to curb anti-social behaviour and to address current inadequate drainage in the area. Thus the matter is explained as follows in the Invitation To Tender ("ITT"):

> "1.3.2 Currently, the route is used by pedestrians, local residents, Tottenham Hotspur fans and cyclists. There are issues with Anti-Social Behaviour and street drinking, which the proposals aim to address. The existing drainage network has insufficient capacity to manage a storm event with localised flooding and large areas of ponding. The latter is exacerbated by the site's very slight longitudinal fall.
>
> 1.3.3 The Council plan to improve the link, introduce a pocket park to activate the space and install Sustainable Urban Drainage… to increase drainage capacity.
>
> 1.3.4 The project is funded through Mayor's Regeneration Fund… Council Capital funding, Section 106 and Section 278 contributions."

10. Paragraph 1.4 set out the objectives of this scheme noting that it would form part of enjoyable public spaces in the borough and create an "excellent piece of public realm and a safe welcoming and inclusive space for all category of users." As set out in paragraph 1.5, there would be footway/cycleway resurfacing works, the new pocket park, new drainage, installation of play equipment and a scooter track, installation of outdoor gym equipment, improved street lighting and rationalisation of street furniture.

11. In the minutes of the Council Cabinet when the award of the contract was approved, under item 114 it was stated that there was strong community support for the project and reference was made to the access to the new stadium along with improving drainage etc. It added that

if the project was not pursued then the anti-social behaviour in the area would not be resolved and there would continue to be the inadequate drainage. It was also considered more effective to test the market by undertaking a competitive procurement process to secure the most economically advantageous tender to the Council.

12. As the ITT made clear, the window for carrying out the works was short - effectively between the end of this football season and the start of the next. It stated that all the works had to be completed by mid-August 2019 save for any soft landscaping which did not require traffic management measures. The start date for the actual works on site was 13 May, the day after the last game in the premiership season.

13. On 27 March, as well as informing MHL that it had won the bid, the Council issued to it a letter of intent under which MHL has now already operated, by ordering various supplies and undertaking preparatory works. The ITT provides that should the bidder's tender be accepted, it would agree to enter into a formal contract prepared by the Council's legal advisers and until that was executed, the tender and written acceptance thereof would constitute a binding contract.

14. On 17 April 2019 Mr Phelps instructed his colleagues to action the making of the contract itself and to send copies to MHL for signature. In the event, MHL actually collected the copies for signature on 29 April and returned them signed, on 30 April. As at 9 May, the Council had not yet signed them.

**THE LEAD-UP TO THE ISSUE OF PROCEEDINGS**

15. As noted above, Kenson could have learned of the Council's decision on or after 19 March; in fact, (as I understood from Kenson's submissions) it did not look at the Council's website then. However it was made aware upon receipt of the letter of 27 March. On 2 April, Kenson wrote to the Council seeking details of the reasons why it had not been awarded the contract and it sent a chaser on 5 April. That letter ended by saying that "Unless we hear from you substantively by 1600pm Monday April 8th 2019, we will have no option but to consider taking any required legal action to take matters forward."

16. The Council responded on 8 April giving some details of the scoring but maintaining the correctness of its decision. However it offered Kenson the opportunity to attend a debrief meeting, which was not taken up. On 9 April, Kenson replied, seeking further information. It also said that unless it had received by 4 p.m. on Friday 12 April, all the documents it had required, "we will have no choice but to issue proceedings without further recourse to you. Of course, we reserve our position to do so anyway should the material provided by you fail to fully explain and document your position." In its letter of reply dated 11 April, which gave some further information, the Council concluded by saying that it had "taken the decision to award the contract to Marlborough Highways Ltd and stands by its evaluation of the tenders submitted in this process. Whilst we appreciate that this may not be the outcome you are looking for, the Council does not intend to alter this decision or enter into protracted correspondence relating to the evaluation."

17. There the matter rested. Kenson did not in fact commence proceedings then. It only commenced them two weeks later, on 25 April.

18. There is no good reason for such a delay which was itself contrary to Kenson's earlier intimation of proceedings. The fact that Easter intervened is not a justification for not proceeding earlier. Procurement claims such as this with attendant applications for interim relief are matters which have to proceed with real expedition and must be made "promptly"; all the more so here where the nature of the time constraints faced by the Council meant that the works had to start on time on 13 May and where there was a confined contract period. Moreover, although Kenson said that it needed time to obtain further legal advice, it had already been making points about the procurement process since 2 April and had already threatened legal proceedings anyway. Furthermore, it is a substantial company. Although it appears to have gone to counsel only on 15 April, it could have done so much earlier.

19. As to why the order of Murray J was not emailed until mid-morning on 26 April, it appears that Kenson's solicitors only received it by email from the Court at 5.18 p.m. on 25 April. It seems that the order was also emailed by the Court direct, to the Council and MHL. Not much turns on this delay although I would have thought that Kenson could have tried to inform the other parties by email or telephone at least that the order had been made, on 25 April or earlier on 26 April.

20. Further, I cannot, for my part, understand why in fact, Kenson applied to Murray J on a without notice basis which was the effect of their application on an urgent expedited basis for directions, hence it being placed before him on 25 April. If the answer is because it felt that the matter was so urgent that there was no time to give any formal notice to the other parties, any such urgency was entirely of its own making. It is true that Kenson emailed a letter dated 24 April to Mr Phelps, saying that they would shortly be issuing proceedings on an urgent expedited basis and seeking interim relief but that is not the same as making an application on notice.

21. It is also true that Mr Phelps did not read the emails sent to him on 24 and 25 April at the time. Indeed he did not read them until Monday 29 April. However he explained in his witness statement that he had to deal with some urgent matters on 25 April and was then running an internal workshop on 26 April. Once he read his accumulated emails on 29 April, he acted very swiftly. I think it is a fair point that it was odd to have emailed him as he was not the main contact for this procurement exercise. There was also a contact section on the Council's website but this was not used. Nor was there any attempt to get in touch by telephone to the Council's Legal Department. Nor does it appear that the emails that were sent were expressed to be urgent.

22. In the case of MHL, its first communication from Kenson was the email of 24 April stating that proceedings would shortly be issued. I have already referred to the limited nature of the documents sent to MHL. Kenson took no initiative to propose a confidentiality ring at the outset with MHL so that at least its lawyers could see the full amount of material being relied upon. The confidentiality ring was proposed by MHL's solicitors and only agreed just before 3 p.m. on 1 May. While paragraphs 54 and 55 of the TCC Guide state that the claimant and the defendant should ensure that the interested party has relevant information, in an urgent case such as this, being driven by the claimant, Kenson, the onus was on it to put in place arrangements at the earliest opportunity so as to enable MHL (or at least its lawyers) to be in a position to make appropriate representations to the Court. This is especially so when Kenson was pressing for an urgent hearing. It is no answer to say that

on 25 April, MHL was told the Statement of Facts and Grounds were confidential and could not be disclosed to any third party (ie including MHL) in the absence of a confidentiality ring when such a ring was not proposed to MHL at the same time and for that purpose telling MHL that their lawyers should be in touch at once, or something to that effect. Indeed, Kenson only wrote to MHL seeking details of their lawyers on 29 April. That, also, could and should have been done at the outset. So the fact that MHL's lawyers only came on the record on 30 April is irrelevant to the question of when Kenson should have taken the initiative on the question of the confidentiality ring.

23. In those circumstances, it is not even clear that MHL (at least), had been properly served as at 8 May. However, that is a secondary point. The main point is that Kenson compounded its delay by not ensuring that all the relevant documents, including its Statement of Facts and Grounds would reach and be seen by the lawyers for the Council and MHL at the earliest opportunity.

## THE QUESTION OF PERMISSION

24. In many, but by no means all, cases where interim relief is sought in JR proceedings, the Court might decide that question at the same time as dealing with permission. If so, it is obvious that if permission is not granted, interim relief will not be either. If permission is granted, interim relief may still not be appropriate.

25. But often (and this case is a good example) the Court will be dealing with the question of interim relief alone. What might happen subsequently at the permission stage is not directly relevant. That is, not least, because by the time the Defendant (and any Interested Party) has served an AOS and the summary grounds of defence, the arguments and evidence may have moved on. It is not uncommon for interim relief to be granted only to be discharged at the permission stage when on a closer analysis, it appears that there is no arguable case to go forward.

26. So while the permission stage involves a consideration of the merits, I do not think it is particularly useful for the Court at an earlier stage to make predictions about whether permission will or will not be granted thereafter, so far as general merits are concerned. The assessment of merits in the injunction context should focus principally on the merits as the Court perceives them to be at the time. The corollary of this is that merely because a Court on an application for interim relief is satisfied that there is a serious issue to be tried (see below) that does not mean that when permission is later considered, it will or must be granted.

## THE CORRECT APPROACH TO INJUNCTIVE RELIEF IN THIS CASE

### Serious issue to be tried

27. It is common ground that the *American Cyanamid* merits threshold of "serious issue to be tried" is relevant in this context, too.

28. The general approach is summarised in the *Administrative Court Guide* as follows:

> "**15.6**. Criteria for the Grant of Interim Relief
>
> **15.6.1**. When considering whether to grant interim relief while a judicial review claim is pending, the judge will consider:

**15.6.1.1.** Whether there is a real issue to be tried. In practice, in judicial review claims, that involves considering whether there is a real prospect of succeeding at the substantive hearing, that is to say a more than a fanciful prospect of success;

**15.6.1.2.** Whether the balance of convenience lies in granting the interim order;

**15.6.1.3.** Any other factors the Court considers to be relevant.

**15.6.2.** Generally, there is a strong public interest in permitting a public authority's decision to continue, so the applicant for interim relief must make out a strong case for relief in advance of the substantive hearing."

29. On any view, the serious or "real" issue to be tried at is a relatively modest threshold. I do not think that any further elaboration of it is either necessary or helpful.

**Balance of Convenience**

30. Most procurement challenges involving public authorities fall within the PCR and are governed by that regime. Thus, for instance, in the event of a successful claim, there is a right to damages albeit that it must first be shown that the relevant breach of duty on the part of the public authority is "sufficiently serious". In addition, once a claim is made, there is an automatic suspension of the process of awarding the contract to the successful tenderer, or executing it. The claimant may apply to set the suspension aside and on any such application the Court will consider whether the continuation of the suspension is justified, as if the claimant had applied for an injunction to the same effect.

31. In such cases, the usual *American Cyanamid* analysis is appropriate, with the modern characterisations thereof which place emphasis on the overarching questions for the Court to decide namely which party will suffer more irremediable prejudice if the injunction is or is not granted (as the case may be) or where the overall balance of justice lies.

32. In the case before me, all parties sought to apply *American Cyanamid* in this way. Kenson's key point as to why damages would not be an adequate remedy if no injunction was granted when it should have been, focused not on the putative contract in question. That is hardly surprising since Kenson is a large company and loss of this one contract would not be fatal to its business as a whole or anything like it. The calculation of damages would be straightforward, based on its likely loss of net profit in circumstances where it had obviously costed the contract in order to produce a tender at a particular price.

33. Instead, Kenson concentrated on the potential for a different, much larger procurement exercise (in which again both it and MHL had produced tenders), to somehow contain the same sort of errors as those alleged in the instant case. This became known as "the Tainting Argument" in the submissions before me. For the reasons given below, I consider that it is misconceived.

34. However, when supplemental skeleton arguments were filed on the day before the hearing, Kenson took a new point. This was that damages could not be an adequate remedy here because, in general, damages are not available on a free-standing basis in a JR claim. At the hearing, there was some debate before me about this but it seems to me that the question of the unavailability of damages in this context, and its impact, required further analysis. For that reason I received some further submissions on the point having considered what was said in De Smith's *Judicial Review* 8th Edition at paragraphs18-013 and 18-014.

35. The answer, of course, is that if damages in practice are generally unavailable in a JR claim on a free-standing basis (or at any rate would not be awarded in the instant case) the logical consequence is that they simply fall out of account altogether because the issue is irrelevant. The removal of the question does not create a presumption in favour of either side on the balance of convenience. It just means that the balance of convenience focuses on other things. In my judgment, the position is correctly summarised in the paragraphs of De Smith referred to above, as follows:

> "**18-013** Moreover, questions as to the adequacy of damages as an alternative remedy will usually be less, or not at all, relevant because of the absence of any general right to damages for loss caused by unlawful administrative action per se. Conversely, the defendant does not usually suffer financial loss from the inability to implement its policies for a period. It follows that in cases involving the public interest, for example where a party is a public authority performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of the adequacy of damages but on the balance of convenience test. In such cases, the balance of convenience must be looked at widely, taking into account the interests of the general public to whom the duties are owed. The courts will be vigilant to prevent a claimant from seeking an injunction against an interested party in judicial review proceedings when the dispute is really one suitable for a private law claim.
>
> **18-014** Another difference from private law proceedings is that in judicial review, there is less likely to be a dispute of issues of fact. Where the only dispute is as to law, the court may have to make the best prediction it can of the final outcome and give that prediction decisive weight in resolving the interlocutory issue."

36. See also paragraphs 15.6.1.2 and 15.6.2 of the *Administrative Court Guide,* cited above.

37. In a case where the defendant may suffer a financial loss if the injunction was wrongly granted, the Court will, of course, then consider the provision of a cross-undertaking in damages by the claimant.

38. In the submissions which I required on this issue, both the Council and MHL still maintained that there was no such general unavailability of damages. However, I am quite satisfied that the safer course to pursue at this stage is to assume that they are unavailable here. This is notwithstanding that (a) s31 (4) of the SCA 1981 permits the Court to award damages on a JR application provided that they would have been awarded if the claim had been made in an ordinary action, (b) CPR 54.3 (2) provides that a claim for judicial review may include a claim for damages as long as that remedy alone is not sought and (c) in *R (Fayad) v Sec of State for the Home Department* [2018] EWCA Civ 54, at paragraph 45, Singh LJ emphasised the importance of the ability of the court now to award damages in JR claims. Put another way, there is a real risk that if Kenson succeeds on liability at trial whatever remedies it may secure, damages will not be one of them.

39. The artificiality of the position taken by the parties on this question at the hearing was reflected in the facts that (a) while Kenson maintained that there is no such right to damages, it had in fact claimed damages in its claim form and was not prepared at the hearing to withdraw that claim (although it did so in its Note on the following day), and (b) while the Council maintained that such damages were generally available, it was not prepared to accept in open court that they would be here, or to give an undertaking to that effect.

**Relevance of the Merits**

40. It is clear that where appropriate, the Court can take into account within the balance of convenience exercise the substantive merits: see paragraphs 17 and 18 of the opinion of the Privy Council in *NCB v Olint* [2009] 1 WLR 1405, given by Lord Hoffmann, paragraphs 135-139 of the judgment of Vos J in the procurement case of *Alstom v Eurostar* [2010] EWHC 2747, and the observations of Morgan J at paragraph 215 of his judgment in another procurement case, *Lion Apparel v Firebuy Limited* [2007] EWHC 2179 (Ch). In my judgment, this is not limited to cases where the only dispute is as to law, such that the view of the merits is likely to be decisive (see De Smith at 18-014 cited above). Even if there is some element of factual or analytical dispute, the merits can in an appropriate case be taken into account. Precisely how they are taken into account will depend on the other balance of convenience factors, the nature of the JR claim and the response thereto, and whether the merits are particularly clear in one direction such that it can be said, for example, that the claimant has a plainly or clearly strong - or weak - case. Where the prospects of success are more nuanced, the exercise of looking at the merits is not likely to be productive or appropriate.

41. In my judgment, I also consider that where, as in this context, the adequacy of damages for the claimant is not a live issue, there is probably more justification for taking merits into account at the balance of convenience stage; however, whether or not that proposition is correct makes no difference to the outcome here.

**<u>JUSTICIABILITY</u>**

42. Whether there is a public law claim here at all is not simply relevant at the permission stage. It forms part of the merits of the case. Here, the Council contends that it is not. Kenson says that it is.

43. It is not easy or perhaps even desirable to formulate a general test for when a decision of a public body like the Council here, concerned with a contract, or the award of a contract, should be susceptible to a claim for JR.

44. It is clear (and obvious) that the fact that the defendant is a public body is not sufficient. As Waller J (as he then was) put it in *R v Lord Chancellor's Department Ex p Hibbit*, 11 March 1993, Divisional Court, at paragraph 29:

> "… It is critical to identify the decision and the nature of the attack on it. Unless there was a public law element in the decision and unless the allegation involves suggested breaches of duties or obligation owed as a matter of public law, the decision will not be reviewable."

45. I have considered, in particular, the decisions of McCombe J (as he then was) in *Menai Collect Limited v DCA* [2006] EWHC 724 (Admin), Gibbs J in *Gamesa Energy v National Assembly for Wales* [2006] EWHC 2167 (Admin) and Lewis J in *Sustainable Development Capital v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin), which were all procurement cases and which all in turn considered many of the authorities on justiciability. From those cases it seems to be that the following considerations (at least) will be material in deciding whether the necessary public element is present:

(1) The nature and status of the particular public body concerned: this may be relevant because some such bodies may have an obviously greater public importance than others;

(2) The subject matter of the contract in question: this will include the status and nature of the other party or tenderers, along with the nature and scope of the works and the extent to which they might be described as "public-facing" and/or for the benefit of the public; also relevant is the source of funding; however, it must be borne in mind that as the contract put out to tender is being awarded by a public body, there will usually be some element of public funding and the contract will usually have some public connection;

(3) The source of the tender process used: that is to say, whether the particular process employed was specifically mandated to the defendant body, for example by statute or some other binding provision, as opposed to one essentially devised by that body; it will be relevant to know whether the body was purporting to comply with any statutory obligation in seeking tenders for this contract or whether it was simply empowered to do so;

(4) The nature of the challenge: this can take a variety of forms, including arguments that:

(a) there was a failure by the relevant body to comply with some aspect of the mandated process or some other statutory obligation relating to it;

(b) the particular policy or process adopted by it was itself unlawful in a public law sense;

(c) the actual decision in question involved fraud, corruption or bad faith on the part of the relevant body;

(d) in carrying out the process (in particular the scoring of rival bidders) the relevant body acted unfairly or irrationally.

46. Something more needs to be said about the fourth factor, the nature of the challenge. Obviously, if the relevant body acted outside or in breach of its statutory obligation or power, that will generally be viewed as a more serious matter than acting irrationally in a particular case. Equally, a challenge to the lawfulness of the policy or process itself may be regarded as more substantial or fundamental than how it is applied in one case. Thus, as De Smith puts it at paragraph 3-068, some grounds of challenge "score more highly" than others in this context. But there is a risk of confusing (a) the nature of the challenge in the context of justiciability with (b) whether the public law challenge can actually be made out. Thus, to say that if the relevant body does no more than exercise commercial judgment, there can be no public law claim may be saying no more than that in such a case, grounds of JR unlawfulness cannot be made out. It is akin to saying that there is no viable claim to set aside a decision of the Planning Inspector because the relevant decision was no more than an exercise of planning judgment.

47. In the justiciability context, the point is rather that if the challenge is only one of irrationality within the scoring process, that may well not be sufficient. As Gibbs J put it in *Gamesa*:

> "68. It is necessary to examine the actual bases of challenge to answer the relevant question. For this reason I have found it helpful to have detailed submissions the grounds of challenge so as to inform the decision on jurisdiction…
>
> 76. … The stated aims of the pre-qualification procedure are not and could not be criticised. It follows that the complaints on the basis of irrationality and unfairness are confined to the nuts and bolts of parts of the exercise and their effect on the individual application of the claimant.
>
> 77. Under those circumstances, I find that there are no sufficient public law aspects to the challenge to make it amenable to judicial review…I do not go so far as to say that the public law challenge to a tendering pre-qualification process on the basis of irrationality could never be entertained. I think that the circumstances under which it could be entertained must be rare."

48. I would respectfully agree with those observations. In the tendering process scoring context, I think that the question whether the challenge involves more than scrutinising the "nuts and bolts" of the process as it applies to the individual applicant, is an important one.

## <u>THE CLAIMS MADE HERE</u>

### Generally

49. Both Kenson and MHL were permitted to bid. The scoring process appears to have been set by the Council; at least it was not suggested that it was mandated by statute or some other binding provision.

50. Out of a potential top mark of 100%, 40% was allocated to "quality" and 60% to price. Kenson obtain full marks for its price i.e. 60%, but only **[*]** for quality, giving it a total of **[*]** For its part, MHL scored 49.78% on price but 35% on quality giving it a total of 84.78%. This was **[*]** higher than Kenson's total. The percentages not shown are confidential but are shown in the Confidential Annexe.

51. A helpful matrix of the Council's detailed scoring was produced for the hearing by the parties. Lest some part of it may be considered confidential, I have attached it as part of the Confidential Annexe. I refer to this document below in summary terms only.

52. The key points said by Kenson to support its claim that its bid had been wrongly scored (as emphasised in oral argument) are set out in the full version of this paragraph in the Confidential Annexe.

53. Kenson contends that these points were not simply examples of the Council's commercial judgment but actually constituted errors which could and did vitiate the marks given. Moreover, and as set out in Kenson's Note on Scoring, if one assumed certain higher scores for Kenson on the three items said to contain the errors, then it would be possible for Kenson to end up with a total score which would be just (0.8%) higher than MHL's actual score. In other words, Kenson would have won the bid.

54. As against that, the Council contend that:

    (1) the errors, even if properly so-called, are not significant;

    (2) see the full version of this sub-paragraph in the Confidential Annexe;

(3) so far as causation is concerned, the proposition that Kenson could actually have achieved a sufficiently high notional revised score so as to exceed that of MHL was speculative and unlikely to be correct;

(4) part of Kenson's case rested on, or derived further support from, an alleged breach of the EU principle of "effectiveness"; but in truth, there is no cross-border interest element here. This is not a case where the PCR applies and in those circumstances, EU general principles such as effectiveness have no role to play.

55. I think that there is considerable force in the Council's response on all of those points. In particular I agree that there is no EU angle here at all. I also think that at trial it is not likely that Kenson will be able to make out causation. Indeed, at the permission stage there may be a real argument about whether this is a case where s31(3C) of the SCA 1981 applies - see also CPR 54.8 (4) (a) (ia).

**Justiciability**

56. I consider that there is a strong argument that this case is not justiciable. There are obviously significant local public benefits to the contract works which have been identified by the Council and at least some of the funding is public. But on the other hand, this is in reality no more than a "nut and bolts" challenge to the scoring as it affects one commercial bidder in a contract of modest value. It is not suggested that the marking system is itself unlawful or that the Council has acted in breach of any statutory obligation.

## ANALYSIS

**Serious Issue to be tried**

57. I conclude that this threshold is made out - just. The fact that I so find at this stage does not dictate what may be decided at the permission stage where there may be fuller arguments and materials. The grant of permission is certainly not a foregone conclusion in my view.

58. However, the claim on any view is clearly a weak one. This is relevant to the balance of convenience. It is weak because:

(1) The substantive claim is weak - see paragraphs 54 and 55 above;

(2) There is a strong argument that the claim is not justiciable at all - see paragraph 56 above;

(3) There was an unjustifiable delay on the part of Kenson in bringing this claim. The delay was compounded by the way in which the relevant papers were provided to the Council and MHL; see paragraphs 15-23 above. Delay affects the merits because it can be an impediment to the grant of permission (irrespective of merits) or the grant of final relief even if the claim otherwise succeeds.

59. I do not consider that there are such issues of disputed fact which mean that it is inappropriate for the Court to take a view on the merits for the purpose of balance of convenience.

**Balance of Convenience**

60. This plainly favours the Council for the following reasons:

(1) Any trial of this claim is not likely to take place for at least 3-4 weeks and then a judgment needs to be produced. That is likely to be an underestimate of the delay to the commencement of the works if the injunction is granted. It is true that there is presently a match planned for 4 August. While this means that there may already be some delay, or compression of the timetable for the works I do not accept that by itself it means that they cannot now be done in this closed season. But if there is a 4 week (or more) delay in starting them and indeed in doing any further preparatory works (which the injunction sought would prevent), the strong likelihood is that they will not be done in this closed season at all; this outcome cannot be avoided by delaying such landscaping as is permitted to be done at a later stage; the delay is too great and moreover is partly contributed to by when Kenson actually started this claim and sought interim relief;

(2) MHL has already invested significant sums in preparatory works; I do not consider that these were done deliberately to create "facts on the ground" so as to prevent the injunction; it had to get on with preparatory works in any event since it had been awarded the contract (albeit only it and not the Council had signed it as at 9 May); there was debate before me over how the letter of intent works in terms of the limit of £50,000, but that debate did not really assist on this point;

(3) Equally, since the Council instructed that the contract be made available for signature by MHL on 17 April (albeit it was not collected until later) it cannot be said that this was a step taken by the Council deliberately to defeat any injunction application. None had been made at that point and there had been no further response after the Council's letter of 11 April;

(4) It is no answer to say that at worst the works will be delayed until next year. There is a genuine public interest in getting on with them now. There is an important public and social dimension to them – affording much needed and critical public access to the new stadium, combating anti-social behaviour and addressing current inadequate drainage. These are existing problems, not simply ones which would arise if the works were attempted during part of the football season; and if a delay until next year is sought to be avoided by allowing the delayed contract works to run on this year into the 2019/2020 season there would be all the problems identified by Mr Phelps. It is not known at the moment if MHL would be able to undertake the works next year if they had to be delayed until then because of this injunction and yet the substantive claim failed;

(5) The Tainting Argument is to the effect that it may be that the sort of errors alleged in respect of this procurement exercise may well be repeated in a separate ongoing procurement exercise run by the Council where, again, both Kenson and MHL are bidding. This is for a very much larger contract where the works are valued at about £108m. However it is being run by a different procurement team at the Council. Nonetheless, Kenson says that unless the injunction is granted in respect of the instant exercise it might lose the bid on the other one because of similar (and unlawful) errors in the scoring and in that context, its losses would be very large and less easy to quantify. In my judgment, this is a hopeless contention. It is no part of an assessment of this injunction application, concerned with this procurement

exercise, to second guess, in a speculative fashion, how a separate procurement exercise might be carried out even before it has finished. The two exercises are quite different, carried out by different teams from the Council albeit that Kenson and MHL are both bidders there also; that is so even if some of the scoring themes used are the same as here. If Kenson loses in the next exercise and considers that the Council acted unlawfully, it can then bring a claim in that context;

(6) The weakness of the claim; see paragraph 58 above;

(7) The status quo, for present purposes is not that nothing has yet happened. It is that the contract has been awarded, preparations have already started and there is a critical start date which was the Monday after the hearing ie 13 May. It cannot therefore be said that an injunction to stop all of that is simply "holding the ring";

(8) For the sake of completeness, if damages were available, then one must consider also if they would be an adequate remedy for Kenson. They clearly would be, because their lost profit is easily calculable and there is nothing in the Tainting Argument. But as indicated above, I proceed on the footing that they are not.

## CONCLUSION

61. For all the reasons given above, it is clear that the interim relief sought here must be refused.

62. All consequential matters will be dealt with at the handing-down of the full judgment unless agreed in advance. I am most grateful to all Counsel for their assistance and submissions.