Neutral Citation Number: [2021] EWHC 3049 (TCC)

Case No: HT-2021-CDF-000002

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 16 November 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

ADFERIAD RECOVERY LIMITED	**Claimant**
- and -	
ANEURIN BEVAN UNIVERSITY HEALTH BOARD	**Defendant**

- -
- -

Rhodri Williams Q.C. (instructed by **Watkins and Gunn**) for the **Claimant**
Jorren Knibbe (instructed by **NWSSP Legal and Risk Services**) for the **Defendant**

Hearing dates: 18 and 19 October 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 16 November 2021.

JUDGE KEYSER QC:

Introduction

1. In these proceedings the claimant claims relief for what it alleges are the defendant's breaches of public procurement law. It relies on three bases of claim: (1) a right of action pursuant to regulations 89 and 91 of the Public Contracts Regulations 2015, as amended ("the 2015 Regulations"); (2) principles of retained EU law; (3) breach of a contract as to the conduct of the procurement.

2. This is my judgment upon the defendant's application dated 10 September 2021 for summary judgment on the claim under CPR r. 24.2 or for an order striking out the claim pursuant to r. 3.4(2)(a).

3. The law relating to applications under r. 24.2 and r. 3.4 is familiar; it has been set out many times in the case-law, and I shall not set it out again. For no better reason than convenience, I refer to my own recent summary in *Maranello Rosso Limited v Lohomij BV and others* [2021] EWHC 2452 (Ch) at [16]–[25] and to the cases mentioned there. I also have regard to the observations of Stuart-Smith J, in the context of public procurement, in *MSI-Defence Systems Limited v Secretary of State for Defence* [2020] EWHC 1664 (TCC) at [5]-[8]; however, no special or different principles apply in public procurement cases.

4. In the present case, the defendant contends that the court has the relevant materials to enable it to hold now that the various bases of claim advanced by the claimant are bad as a matter of law. It contends, accordingly, that no part of the claim has a real prospect of success and that there is no other reason why it should be permitted to proceed to trial.

5. The application was heard over two days by Cloud Video Platform. I am grateful to Mr Jorren Knibbe and Mr Rhodri Williams QC, counsel respectively for the defendant and the claimant, for their detailed and focused submissions. In the remainder of this judgment I shall first set out the material facts, citing extensively from the relevant documents, and then consider in turn the issues that arise on the application in respect of the three bases of the claimant's claim.

The facts

The parties

6. The defendant is the local health board responsible for the provision of health and social care services under the National Health Service (Wales) Act 2006 in the local health board area comprising Blaenau Gwent, Caerphilly, Monmouthshire, Newport, Torfaen and South Powys (the "ABUHB Area").

7. The claimant is a registered charity that provides services for people in England and Wales with mental health problems, substance misuse problems and co-occurring and complex needs. In fact, it was not the claimant but a similar charity, Hafal, that tendered in the procurement to which these proceedings relate. But, at least for the

purposes of this application, the defendant now accepts that by reason of a merger on 1 April 2021 the claimant acquired the rights and liabilities of Hafal and that it is entitled to bring these proceedings. I shall make no further reference to Hafal and shall proceed on the basis that anything it did was done by the claimant.

Before the Procurement

8. On 2 December 2020 the defendant sent a notice (the "Event Notice") by email to potential providers, advertising its intention to hold a "Gwent Sanctuary Engagement Event" (the "Engagement Event") by a meeting on Microsoft Teams on 10 December 2020. The Event Notice stated:

> "Aneurin Bevan University Health Board are proposing a 1 year pilot Sanctuary service for people in Gwent experiencing a personal crisis or episode of emotional distress.
>
> The proposed service would be for anyone over the age of 18 who is experiencing a personal crisis or episode of emotional distress but who does not require a clinical mental health assessment or intervention from existing service providers. The sanctuary is therefore aiming to provide a pre-crisis or early intervention service that may prevent some people going on to develop more serious conditions.
>
> The Health Board is looking to engage potential providers in a virtual Teams event to discuss the proposal and to gain their feedback."

9. Representatives of the claimant attended at the Engagement Event, at which the defendant gave two presentations: the first outlined its proposals for the planned service (the "Sanctuary Service"), and the second concerned the planned procurement process. Each presentation included the display of a set of slides.

10. The first presentation began with a slide headed "Strategic Context", which included the text: "Together for Mental Health 10 year strategy – 3 year Delivery Plan". There followed a slide headed "Our Vision", which said that the defendant's vision was to provide:

> "High quality, compassionate, person-centred mental health and learning disability services, striving for excellent outcomes for the people of Gwent."

A slide headed "Transforming Adult Mental Health Services in Gwent" showed a diagram portraying a "whole 'Clinical Futures' approach for adult mental health services in Gwent". This involved a progression of stages: (i) Staying Healthy (which included "sanctuary"); (ii) Care Closer to Home (including, among other things, GP, Primary Care Mental Health Services, and Crisis Assessment); (iii) Individuals requiring Admission for mental health or learning disability issues; and (iv) Specialist Inpatient (including secure units). Another slide stated the "Key principles of sanctuary":

"• Support to an individual to respond to their emotional or life crisis & find own solutions

- Safe space for people outside of normal working hours
- Non clinical, homely environment
- Staffed by third sector
- Work in partnership with other services to liaise, sign post and broker support."

The scope and limitations of the Sanctuary Service were set out in some further slides:

"Proposed Model

- 12 months test of change/pilot
- For adults experiencing emotional/life crisis
- Operated from physical building which is Covid-19 compliant
- Opening ?6-9pm – 3am Thurs/Fri/Sat/Sun
- Self-referral or professional referral via phone with triage in place
- Availability of 121 support
- Communal areas
- Facilities to provide food/showers
- Transport
- Recovery plans
- Onward referral with follow up
- Presence of peer mentors / peer support workers
- Building close to transport links etc"

"Not in proposed model

- Not a place of safety
- No accommodation i.e. beds
- No clinical expertise will be on site

> • Can't accept an individual under the influence of alcohol and/or drugs if deemed that they won't benefit from the service
>
> • Not a drop-in".

11. The second presentation, which was given by Mr Jack Robinson, a Procurement Business Manager within the NHS Wales Shared Services Partnership ("NWSSP"), included a slide that set out the indicative procurement timetable. All that need be noted here is that, after notification of the award decision on 18 February 2021, there was to be a "Voluntary Standstill Period" until 1 March 2021.

The Procurement

12. On 5 March 2021 the defendant commenced a procurement exercise ("the Procurement") for the award of a contract for the provision of the Sanctuary Service within the ABUHB Area by publishing a Contract Notice on the Sell2Wales website. The Procurement was conducted by NWSSP on behalf of the defendant and, after publication of the Contract Notice, was conducted using the eTenderWales online portal (the "Portal").

13. It is common ground that the correct detailed description of the required services was set out not in the Contract Notice but in the Sanctuary Provision Service Specification (the "Service Specification") that was provided as Appendix A to the Invitation to Tender (see below). However, section 2.2 of the Contract Notice gave the following overview of the Sanctuary Service:

> "The Sanctuary Service will provide a non accommodation based 'safe space' for people and will operate out of hours. It will support people experiencing a personal, emotional or early stage mental health crisis in the community with access to information, advice and assistance and a range of other support mechanisms with an emphasis on early intervention and prevention. This covers a broad spectrum of need and the Sanctuary System will bridge a significant gap in primary and secondary care mental health provision by providing a non-clinical, recovery led service, alongside more traditional routes and services."

14. Section 2.3 of the Contract Notice set out "Commodity Codes" as follows:

- 85000000 Health and social work services
- 85100000 Health Services
- 85144000 Residential health facilities services
- 85323000 Community health services.

The defendant accepts that Code 85144000, "Residential health facilities services", was included incorrectly, because the Sanctuary Service did not involve any

accommodation element. I shall say more about the Codes and explain their significance later.

15. Section 2.4 of the Contract Notice, headed "Total quantity or scope of tender", stated simply: "122,000".

16. Section 3 of the Contract Notice, headed "Conditions for Participation", stated: "Agreement to NHS Wales Standard Ts and Cs for services".

17. Anyone who, upon reading the Contract Notice, wished to participate in the Procurement would have to do so via the Portal. The home page of the Portal contained some basic information, including the following:

- "Estimated Value of Contract – 122,000"
- "Currency – GBP"
- "Type of contract – Services"
- "Contract duration – 12"

18. The documents available on the Portal included the Invitation to Tender ("ITT"), the Service Specification at Appendix A to the ITT, and the NHS Wales Standard Terms and Conditions for the Provision of Services ("the Standard Terms") at Appendix C to the ITT.

19. At the start of the ITT was a Notice in several paragraphs, including the following:

> "1.5 Whilst reasonable care has been taken in preparing the ITT, neither the Health Board nor any of its advisers accepts any liability or responsibility for the adequacy or completeness of any information or opinions stated in this ITT. No representation or warranty, express or implied, is or will be given by the Health Board or any of its representatives, employees, agents or advisers with respect to the ITT or any information on which it is based. Any liability for such matters is expressly excluded.
>
> 1.6 In so far as it is compatible with any relevant laws, the Health Board reserves the right, without prior notice, to change the basis of, or the procedures for, the competitive process for the award of the contract or to reject any or all Tenders. In no circumstances will the Health Board incur any liability in respect of the foregoing."

20. Section 1 of the ITT, "Introduction", began with a summary in identical terms to the overview in the Contract Notice (paragraph 13 above). Section 2, headed "Tender", stated:

> "2.1 This ITT sets out the Health Board's conditions for Tenders and the process which will be followed by the Health Board in awarding a contract to provide the Requirement.

> 2.2 The Health Board will award the contract for the Requirement based on the bid that offers the greatest value, using the evaluation criteria identified below."

21. Section 3 of the ITT, "Health Board Requirements", contained the following provisions:

> "3.2 Bidders should note that the Appendix C of this ITT sets out the terms and conditions of contract (the 'Contract') which the Health Board intends to enter into with the winning Bidder for the provision of the Requirement.
>
> 3.3 Any Tender submitted which seeks to vary or alter the proposed Contract may be deemed non-compliant and the Bidder excluded from further participation in the tender the process."

22. Section 5.1 of the ITT out the selection and award criteria; these need not be set out here, but they included a presentation that was to be held via Microsoft Teams on 9 April 2021. A relevant entry was headed "Commercial Response":

> "The maximum annual budget available for this contract is as follows:
>
> Annual Budget £122,000
>
> It is expected that the Contract will deliver value to ABUHB and be focused on direct delivery and positive outcomes. As such ABUHB are seeking bids that are costed in consideration of this and should be taken into account by bidders when providing their fully costed breakdown.
>
> It is the intention of ABUHB that the entirety of the budget will be committed to delivery of this service and the winning bidder should price their commercial response on this basis (i.e. the proposal should consider that the maximum budget would be spent on delivery with the winning bidder).
>
> Bidders should provide a detailed cost breakdown for complete delivery of the service in line with the response to the quality questions as above and in consideration of the requirements as detailed in the specification.
>
> The breakdown must clearly detail all the costed elements for delivery of the service including, but not limited to, delivery costs, all staffing costs, all non-staffing costs, overhead costs etc. It should also include the % management charge associated with the delivery of the service and the % of direct staffing.

> Bidders are required to confirm that all services as detailed can be delivered in line with the budget as above. This will be a pass/fail response …"

23. Section 6 of the ITT set out the Procurement Timetable: the deadline for submission of tenders was noon on 29 March 2021; the notification of the award decision was to be on 16 April 2021; and the contract was to be awarded on 27 April 2021 and to commence on 7 June 2021. The period from 16 April 2021 until 26 April 2021 was shown as "Voluntary Standstill Period".

24. Section 9.1 of the ITT provided:

> "Except for manifest error or as may otherwise be expressly agreed by both the Health Board and the Bidder, the contents of submitted Tenders will be deemed to be binding upon the Bidder and open for acceptance by the Health Board for a period of 180 days. Therefore, Bidders are cautioned to verify their proposals before submission to the Health Board. The Health Board reserves the right, at its absolute discretion not to accept any Tender submitted in response to this ITT."

25. Section 11.3 of the ITT provided:

> "The Health Board reserves the right to make amendments to the ITT at any time up to the award of the contract."

26. Section 19 of the ITT, "Right to Reject/Disqualify a Bidder", set out various circumstances in which the Health Board reserved the right to reject or disqualify a Bidder in the Procurement; these included that case where

> "the Bidder and/or a member(s) of its supply chain are unable to satisfy the terms of Article 45 of Directive 2004/18/EC and/or Regulation 23 of the Public Contracts Regulations 2015 at any stage during the tender process".

27. Section 21.2 of the ITT, "General", included the following provisions:

> "21.2.6 Nothing contained in this ITT or any other communication made between the Customer [viz. the defendant] or its representatives and any party shall constitute an agreement, contract or representation made between the Customer and any other party (except for a formal award of contract made in writing by the Customer). Receipt by a potential supplier of this ITT does not imply the existence of a contract or commitment by or with the Customer for any purpose and suppliers should note that this ITT may not result in the award of any contract.
>
> 21.2.7 The Customer reserves the right to change any aspect of, or cease, the tender process at any time.

> 21.2.8 The information in this ITT is subject to constant updating and amendment in the future and is necessarily selective. It does not purport to contain all of the information, which the supplier may require. While the Customer has taken all reasonable steps to ensure, as at the date of this document, that the facts which are contained in this ITT are true and accurate in all material respects, the Customer does not make any representation or warranty as to the accuracy or completeness or otherwise of this ITT, or the reasonableness of any assumptions on which this document may be based. All information supplied by the Customer to the suppliers, including that contained in this ITT, is subject to the supplier's own due diligence. The Customer accepts no liability to the supplier whatsoever and however arising and whether resulting from the use of this ITT, or any omissions from or deficiencies in this document."

28. The Service Specification began with a summary in substantially similar terms to the overview contained in the Contract Notice. Section 2 set out relevant background, which included the following passage:

> "The aim of sanctuary provision is to support people to respond to their own personal or emotional crisis, improving their quality of life and giving them the tools and facilities to identify and respond to crisis at an earlier stage. In addition, sanctuary provision reduces the need for a person experiencing a crisis to access a range of emergency services which can often provide a poor experience and poor outcomes."

29. Section 3 of the Service Specification set out the "Service model":

> "<u>Aim of the service</u>
>
> The Sanctuary Service will provide a non-clinical approach to support people experiencing a personal, emotional or early stage mental health crisis in the community and will offer a comfortable, relaxing, 'home from home' environment in which people can relax, read, eat or drink or simply rest. When they are ready to talk, a person will be offered one to one support where they will be able to co-produce their recovery plan ensuring that they leave feeling better able to cope and to stay well.
>
> <u>Objectives</u>
>
> - Provide an out of hours service for adults (18+) who are experiencing a personal, emotional or early stage mental health crisis, but do not require a clinical mental health assessment or intervention from other existing service providers.

- To provide the above support outside of traditional service operating times.

- To sign post, liaise and broker support for people who require additional advice and support.

- Enable individuals to self-manage and find their own solutions to their own crisis in a non-judgemental, empathetic and respectful way.

- Reduce the need, where appropriate, for people to be referred into primary and secondary care services."

30. Section 4 of the Service Specification concerned "Service Delivery". It stated that the Sanctuary Service would be "a non-accommodation based service, operating outside of traditional working hours" and that "Access to the Sanctuary Service will be via telephone and all referrals will be triaged including a risk assessment."

31. Section 5 of the Service Specification, "Operational Delivery", contained the following passages:

"Capacity

- The facility will need to be able to accommodate a minimum of 4 people at any one time in a Covid-19 safe and secure environment.

- Due to the short-term contract, the provider will need to ensure that any identified building already has appropriate planning permission for usage as a Sanctuary Service.

- In addition the service will need to be able to provide virtual support to individuals who cannot physically attend the building.

- The facility will need to provide at a minimum the following, ensuring all areas are Covid-19 safe and secure: a communal area, a room to facilitate 1-1 meetings and 2x quiet rooms. There will also need to be a kitchen and dining area where individuals can have hot or cold drinks and access to food.

Location

- The Sanctuary Service will be easily accessible and close to transport routes.

- Individuals ability to travel to the Sanctuary Service will need to be assessed as part of the triage process. Offering a virtual service or arranging transport may need to be considered.

- There will be transport available to enable people who have used the service to return home safely.

Support provided

- The service will provide 1-1 support, supporting the individual to recover from their immediate cause of crisis.

- The service will co-produce a recovery plan with the individual for the preceding hours/days/weeks. A follow-up phone call with be made the next day to support the individual with their recovery plan.

- The service will provide onward sign posting and initiate referrals in-hours with appropriate services, liaising with the individual to provide any further necessary information post visit.

- Access to a 'read only' ABUHB patient record database as required will be agreed with the provider. Where appropriate and as agreed with the user of the service, mental health or learning disabilities staff will be notified that an individual has accessed the service.

Staffing

The Sanctuary Service will be staffed by third sector support workers and peer mentors / people with lived experience and there will be no statutory services staff based at the facility. Staffing capacity will need to ensure the following:

- There must be enough staff to maintain adequate staffing levels to support the capacity of the sanctuary and cover regular breaks

- Staff are expected to have a diverse range of skills and experience to engage with vulnerable people experiencing distress.

- The provider must ensure that there are adequate support, supervisory and well-being initiatives for staff members

- In line with best practice, service user representation will be required in all areas of the recruitment process."

32. Section 10 of the Service Specification, "Staff Competencies and Skills", included the following:

> "10.11 Each member of staff should have an individual professional development plan that is assessed, implemented, and evaluated on an annual cyclical basis. This should include the identification of training and development needs."

33. Section 11 of the Service Specification, "Service Outcomes and Quality Monitoring", included these passages:

> "11.6 In advance of a six-monthly review, the service should be expected to provide a six-monthly report covering:
>
> - A quantification and description of the activities of the last year
> - Balance of service provision between the provider and ABUHB
> - Above profile by gender / ethnicity
> - A summary of any collective issues raised by users of the service and carers and outcomes
> - Evidence of, and reflection on, service achievements
> - Report of annual accounts
>
> 11.7 The six-monthly report should be submitted to ABUHB for comments and recommendations
>
> 11.8 The six-monthly report should be made available to interested stakeholders, and therefore should be presented in a format that is appropriate for public circulation."

34. Section 15 of the Service Specification, headed "Transfer of Undertakings (TUPE) – Retendering Information", included the following passages:

> "15.1 The provider will be obliged to agree to co-operate in full with any re-tendering exercise relating to the provision of the Services. Such co-operation will include, but will not be limited to the provision, in good time, of any information reasonably requested by ABUHB which assists future bona fide tenderers who wish to provide the Services (or similar services) with information to enable them to properly assess the financial and staffing implications of the operation of TUPE to a re-tendering exercise. The information required shall include, but not be limited to, that set out below.
>
> 15.2 The provider shall be obliged to provide ABUHB or any potential future service contractor identified by ABUHB with the following information within 14 days of receiving a written request. Such request may be made at any time during the term of the Contract."

35. The Standard Terms at Appendix C to the ITT contained the terms and conditions on which the defendant would contract with the successful tenderer. The "Key Provisions" were in Schedule 1. Clause 2 of Schedule 1, headed "Contract Term", provided:

> "2.1 This Contract commences on the Commencement Date.
>
> 2.2 The Contract Term of this Contract shall be as set out in the Order or where not set out in the Order as set out in the Specification and Tender Response Document.
>
> 2.3 The Contract Term may be extended in accordance with Clause 8.2 of Schedule 2 provided that the duration of this Contract shall be no longer than originally advertised by the Authority [that is, the defendant] and/or Beneficiary (including any options to extend)."

Clause 8 of Schedule 2 to the Standard Terms provided:

> "8.1 The Contract shall commence and (subject to any earlier lawful termination) remain in force for the Contract Term.
>
> 8.2 The Authority may, by notice In Writing, extend the Contract Term, provided that the said notice shall have been given to the Contractor either no later than 12 weeks before the end of the Contract Term, or as otherwise agreed by the parties, provided that the duration of this Contract shall be no longer than the total term specified in the Key Provisions."

36. On 26 March 2021 the claimant submitted a tender under the Procurement. The accompanying costings for delivery of the service showed total costs of £121,925.82, a whisker below the maximum budget of £122,000. The components included:

- Staff costs: £79,291.65
- Building costs £1,000.00
- Taxis & Transport £8,160.00
- IT-related costs £2,000.00.

37. On 9 April 2021 the claimant made its presentation to the defendant.

38. On 7 May 2021 the defendant posted on its electronic portal a tender award notification letter dated 21 April 2021. This showed that the claimant had been unsuccessful and that the defendant intended to award the contract to a rival bidder, Torfaen and Blaenau Gwent Mind ("TBGM"). The letter stated that the standstill period pursuant to regulation 87 of the 2015 Regulations would run until 17 May 2021.

39. The claimant was dissatisfied with the information provided to it by the defendant and made a request for further information.

40. On 11 May 2021 the defendant posted a notice giving further information in respect of TBGM's successful tender. This showed that its total score had been 90% as compared to the claimant's 88%. TBGM had been scored more highly than the claimant in respect of two award criteria: Value for Money, and Presentation. The

notice stated: "It was a close decision though it was felt the presentation in particular for [TBGM] was stronger and had a bit more detail." Further information was posted on the Portal on 19 May 2021. The claimant promptly sought further information. The defendant agreed to extend the standstill period, first till 21 May and then till 7 June 2021.

41. On 24 May 2021 the claimant's solicitor sent a detailed Letter Before Claim to the defendant, intimating a claim "under the Public Contracts Regulations 2015 ('the 2015 Regulations') and/or directly enforceable retained EU law rights." The summary nature of the allegations, which is substantially similar to that of the allegations raised in these proceedings, was that the defendant was in breach of its duties of transparency and equal treatment under regulation 18 or regulation 76 of the 2015 Regulations, and was also in breach of its duties under general principles of retained EU law, in that it had:

- Failed to evaluate the tenders in accordance with the evaluation methodology set out in the Invitation to Tender;
- Evaluated the claimant's tender by way of a comparison with TBGM's tender rather than in accordance with the advertised methodology, or applied evaluation criteria that were not advertised in the Invitation to Tender;
- Committed manifest errors of assessment in the evaluation of the claimant's tender, at the very least in respect of the two criteria of Value for Money and Presentation;
- Committed manifest errors of assessment in the evaluation of TBGM's tender;
- Failed to provide sufficient information or disclosure to comply with its duty of transparency under regulation 86 of the 2015 Regulations.

42. On 28 May 2021 the defendant sent a letter in reply to the claimant's solicitor. It said that, upon reviewing the tender process in the light of the Letter Before Claim, the defendant had found that "an administration error occurred at the point of drafting the award letters", in that the bidders had been provided with the scoring of an individual panel member instead of the evaluation panel consensus score. The result of the Procurement was unchanged, and the letter expressed the defendant's conclusion "that the process followed was robust and the evaluation outcome is correct and in line with the criteria stated in the tender documentation". However, the letter said that a new tender award notification letter would be issued and that, in the circumstances, the defendant was extending the standstill period until 7 June 2021, "taking account of the full voluntary 10-day standstill period stated in the tender documentation", and the contract would be awarded on 8 June 2021.

43. The new tender award notification letter was also dated 28 May 2021. Annex 1 set out the scores obtained by the claimant and by TBGM against the defendant's evaluation criteria, "together with reasons for the award of those scores, including the characteristics and relative advantages of the successful tender compared to your tender." For the purposes of this judgment it is unnecessary to set out the details of the evaluation and scores.

The proceedings

44. The claim form was issued on 3 June 2021 and served on 4 June 2021.

45. On 9 June 2021 I made an order by consent, staying further proceedings in the case until 2 July 2021 and extending the time for filing and service of particulars of claim until 16 July 2021.

46. On 11 June 2021 the defendant responded to the letter before claim. It is unnecessary for me to set out or summarise the contents of that letter or any subsequent correspondence.

47. On 6 July 2021 I made an order by consent that any requirement that might be imposed by regulation 95(1) of the Public Contracts Regulations 2015 ("the 2015 Regulations") that the defendant refrain from entering into a contract with TBGM arising from the Procurement come to an end at the date of the order.

48. On 15 July 2021 the claimant served its particulars of claim. The general tenor of the case advanced was the same as that set out in the Letter Before Claim. The three legal bases of claim—the 2015 Regulations, retained EU law, and contract—will be considered below.

49. The defendant served its defence on 6 August 2021. The claimant served a reply on 27 August 2021. It is unnecessary here to refer to their contents.

50. On 10 September 2021 the defendant filed and served its application for summary judgment or an order striking out the claim. Witness statements were filed and served in support of and in opposition to the application. I shall make some reference to particular parts of the witness statements, but it is unnecessary to list the statements or discuss them in detail.

The grounds of the application

51. The following grounds of application are now advanced by the defendant (an additional ground, concerning the identity of the tendering party, being no longer pursued: see paragraph 7 above):

    1) Parts 2 and 3 of the 2015 Regulations do not apply, because the estimated value of the Procurement was below the relevant financial threshold;

    2) There is no sustainable claim for breach of the requirements of retained EU law, because (a) the estimated value of the Procurement was below the relevant financial threshold, (b) the contract to be awarded was not of cross-border interest within the EU internal market, (c) the relevant requirements no longer apply in England and Wales, and (d) the claim is barred by statute;

    3) The claimant has not identified anything, and there was nothing, capable of constituting an express or implied contract governing the conduct of the Procurement.

The Public Contracts Regulations 2015

The relevant provisions

52. Part 2 of the 2015 Regulations (regulations 3 to 84A, Chapters 1 to 4) implements in domestic law Directive 2014/24/EU ("the Public Contracts Directive"). Notwithstanding the repeal of the European Communities Act 1972, the 2015 Regulations continue in force by reason of section 2(1) of the European Union (Withdrawal) Act 2018. "Unless the context otherwise requires, any expression used both in Part 2 and in the Public Contracts Directive has the meaning that it bears in that Directive": regulation 2(2). Further,

> "an implementing regulation is to be interpreted in the light of the directive which it is intended to implement. Moreover, it is well-established that such national legislation should receive a purposive rather than a literal construction in order to achieve the result pursued by the related directive"

(*Alstom Transport v Eurostar International Ltd* [2012] EWHC 28 (Ch), [2012] 3 All ER 263, *per* Roth J at [35]).

53. Part 3 of the 2015 Regulations (regulations 85 to 104, Chapters 5 and 6) implements Directive 89/665/EC, as amended ("the Remedies Directive"). Chapter 5, Facilitation of Remedies (regulations 85 to 87), applies to contracts and framework agreements falling within the scope of Part 2: regulation 85. (This case does not concern framework agreements and I shall not refer to them further.) Regulation 86 requires a contracting authority to send to each candidate and tenderer a notice communicating its decision to award the contract. Regulation 87 provides that, where regulation 86 applies, the contracting authority must not enter into the contract before the end of "the standstill period"; there are detailed provisions concerning the calculation of the standstill period.

54. Chapter 6 of the 2015 Regulations is titled "Applications to the Court". Regulation 89 provides:

> "(1) This regulation applies to the obligation on a contracting authority to comply with—
>
> (a) the provisions of Parts 2 and 3; and
>
> (b) any retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018 in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.
>
> (2) That obligation is a duty owed to an economic operator from the United Kingdom or from Gibraltar."

Regulation 91 provides:

> "(1) A breach of the duty owed in accordance with regulation 89 … 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."

55. The claim under the 2015 Regulations is accordingly brought pursuant to regulations 89 and 91. It is common ground that the claimant is within the definition of "economic operator" and the defendant within the definition of "contracting authority" in regulation 2(1). The issue is whether the Procurement was within the scope of Part 2 of the 2015 Regulations.

56. Regulation 3 makes provision in respect of the subject-matter and scope of Part 2. It provides, so far as is material for present purposes:

> "(1) This Part establishes rules on the procedures for procurement by contracting authorities with respect to public contracts … which—
>
> (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5, and
>
> (b) are not excluded from the scope of this Part by any other provision in this Section."

57. The 2015 Regulations apply to three broad types of procurement: "public supply contracts", which concern purchase, lease, rental etc of products; "public works contracts", which, broadly speaking, cover building or civil engineering works; and "public service contracts", for the provision of services other than those within the scope of public works contracts.

58. Regulation 5(1) provides, so far as is relevant:

> "(1) This Part applies to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds:—
>
> …
>
> (b) for public supply contracts and public service contracts awarded by central government authorities, … £122,976, …;
>
> (c) for public supply contracts and public service contracts awarded by sub-central contracting authorities, … £189,330;
>
> (d) for public service contracts for social and other specific services listed in Schedule 3, £663,540."

59. Regulation 4 contains provisions addressing the case of "mixed procurement". Paragraph (1), which is not perhaps as clearly drafted as it might have been, contains the following text:

> "(1) In the case of mixed contracts which have as their subject-matter different types of procurement all of which are covered by this Part—
>
> > (a) contracts which have as their subject-matter two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject-matter of the contract in question; and
> >
> > (b) in the case of—(i) mixed contracts consisting partly of services to which Section 7 applies and partly of other services …,
>
> the main subject-matter shall be determined in accordance with which of the estimated values of the respective services … is the highest."

Paragraph (1)(b)(i) is particularly relevant for present purposes. The reference to "Section 7" is to Part 2, Chapter 3 ("Particular Procurement Regimes"), regulations 74 to 77, headed "Social and Other Specific Services". Regulation 74 provides:

> "Public contracts for social and other specific services listed in Schedule 3 shall be awarded in accordance with this Section."

Accordingly, as was common ground before me, regulation 4(1)(b)(i) addresses the question which of the thresholds in regulation 5(1) is applicable to a public service contract where some of the services fall within regulation 5(1)(d) ("Schedule 3 Services") but others do not. The answer to the question is that one must identify the "main subject-matter" of the contract, which is to be determined "in accordance with which of the estimated values of the respective services … is the highest."

60. Regulation 6 contains rules for calculating the estimated value of a procurement. The following paragraphs are particularly material:

> "(1) The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.
>
> …
>
> (5) The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Part.
>
> (6) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons.

> (7) The estimated value shall be calculated as at the moment at which the call for competition is submitted or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure (for example, where appropriate, by contacting economic operators in relation to the procurement).
>
> …
>
> (16) In the case of public supply or service contracts … which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on either of the following:—
>
> …
>
> (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.
>
> …
>
> (19) In the case of public service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:
>
> (a) in the case of fixed-term contracts where that term is less than or equal to 48 months, the total value for their full term;
>
> (b) in the case of contracts without a fixed term or with a term greater than 48 months, the monthly value multiplied by 48."

The issue

61. The basic issue, as regards the claim under the 2015 Regulations, is whether the value of the Procurement was at least equal to the applicable threshold in regulation 5. If (as the claimant says) it was, Part 2 of the 2015 Regulations applied, the defendant was subject to the duty in regulation 89, and a claim under regulation 91 will lie for a breach of that duty. If (as the defendant says) it was not, no such claim will lie.

62. The basic issue gives rise to two critical questions. First, what was the value of the Procurement? Second, what was the applicable threshold? For reasons that will become apparent, I find it convenient to take them in that order.

What was the value of the Procurement?

63. In *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49, [2014] 4 All ER 210, the Supreme Court explained the correct approach to the interpretation of documents in a public procurement; the case concerned the published

award criteria. The basic rule is that the documents are to be taken in the sense in which they would have been understood by a reasonably well-informed and normally diligent tenderer (an "RWIND tenderer"). This standard is objective and impersonal: though the circumstances that would have informed the RWIND tenderer are relevant, the particular understanding held by any actual persons is irrelevant. The following selected passages from the speech of Lord Reed make the important points clearly:

> "3. It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would [be] misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard."
>
> "7. It was in order to articulate the standard of clarity required in this context [viz. article 2 of Directive 2004/18, the forerunner of the Public Contracts Directive] by the principle of transparency that the European Court of Justice invoked the RWIND tenderer. In the case of *SIAC Construction Ltd v Mayo CC* (Case C-19/00) [2002] All ER (EC) 272, [2001] ECR I-7725, where there was a disagreement between the parties as to the interpretation of tender documents, the court stated:
>
> > '41. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, *Unitron Scandinavia A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri* Case C-275/98 [1999] ECR I-8291, (para 31)).'
> >
> > 42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.'
>
> 8. In that passage, the court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential

> tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers."
>
> "14. The rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment. The application of the standard involves the making of a factual assessment by the national court, taking account of all the circumstances of the particular case."

64. In the present case, it is also helpful to see how Lord Reed dealt with the particular argument raised in the *Healthcare at Home* case:

> "25. In relation to the tender criteria, the appellant submits that the Inner House erred in treating the RWIND tenderer as a hypothetical construct, and in applying the RWIND tenderer standard not according to the evidence of witnesses as to what an actual tenderer did or thought, but according to the court's assessment of what a hypothetical RWIND tenderer would have done or thought. The evidence of witnesses from an actual tenderer as to their understanding of the tender criteria, far from being irrelevant, established what RWIND tenderers actually understood, unless it were shown that the witnesses were not reasonably well-informed or normally diligent. The courts below had, it was submitted, confused the RWIND tenderer test with the interpretation of a contract: an objective test was appropriate in the latter context, but not in the former.
>
> 26. For the reasons I have explained at paras [2]–[3] and [7]–[12], above, these submissions are in my view ill-founded. I agree with the way in which this issue was dealt with by the Lord Justice Clerk:
>
> > '60. … The court's decision will involve it placing itself in the position of the reasonably informed tenderer, looking at the matter objectively, rather than, as occurred here to a degree, hearing evidence of what such a hypothetical person might think … Although different from an orthodox exercise in contractual interpretation, the question of what a reasonably well-informed and normally diligent tenderer might anticipate or understand requires an objective answer, albeit on a properly informed basis. Just like those other juridical creations, such as the man on the Clapham omnibus (delict) or the officious bystander (contract), the court decides what that person would think by making its own evaluation against the background circumstances. It does not hear evidence from a person offered up as a candidate for the role of reasonable tenderer. In a disputed

> case, the court will, no doubt, need to have explained to it certain technical terms and will have to be informed of some of the particular circumstances of the terms or industry in question, which should have been known to informed tenderers. However, evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant.'
>
> 27. As the Lord Justice Clerk made clear, evidence may be relevant to the question of how a document would be understood by the RWIND tenderer. The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical inquiry. Although, as counsel for the appellants emphasised, the question is not one of contractual interpretation—the issue is not what the invitation to tender meant, but whether its meaning would be clear to any RWIND tenderer—it is equally suitable for objective determination."

65. In the present case, the value of the Procurement would appear at first sight to have been £122,000, because that was the figure specified for the budget in the Procurement documents. If the value was indeed £122,000, it was below all of the possibly applicable thresholds and the claim under the 2015 Regulations cannot succeed. However, on behalf of the claimant, Mr Williams submitted that the value of the Procurement was not £122,000 but £488,000 and that the issue between the parties was not one that could be determined without a trial. His argument, in summary, was that on a true construction of the Procurement documents, in the light of the relevant surrounding circumstances, no total price was indicated and no fixed term was provided for the contract; therefore the case falls within regulation 6(19)(b) and the value of the Procurement was (£122,000 ÷ 12 x 48 =) £488,000.

66. Because both sides referred me to the contents of the presentations at the Engagement Event, I have referred to them in some detail: see paragraphs 10 and 11 above. However, in my view those matters are irrelevant to the determination of the value of the Procurement and to the correct understanding of the Procurement documents. This is simply because it could not be supposed that the contents of the presentations at the Engagement Event would be known by any tenderer who was not present or represented at that event. The concept of an RWIND tenderer cannot be delimited in the present case in terms of attendance at the Engagement Event, because (a) that event was not part of the Procurement, (b) distribution of the flyer for the event was limited (see paragraphs 14 to 16 of the statement of Mr Mark Lewis, a Commissioning Manager within the Mental Health and Learning Disabilities Division of the defendant) and (c) participation in the Procurement was not restricted to those who had attended the Engagement Event. Even if it were the case that only persons who attended at the Engagement Event bid in the Procurement, the position would be no different. Were it otherwise, those who did not bid because their understanding of

the Procurement was not informed by the Engagement Event would be disadvantaged. Therefore the presentations at the Engagement Event cannot affect the interpretation of the Procurement documents; if they did, not all RWIND tenderers would necessarily understand the Procurement documents in the same way.

67. Even if that were wrong, I should not think that anything said at the Engagement Event would reasonably be capable of affecting the interpretation of the Procurement documents. The presentations made clear that the plan was for a three-year project but that there was to be a one-year pilot. The "Proposed Model" referred specifically to the pilot. There was nothing in the presentations that indicated that the party that bid successfully for the pilot would be awarded a longer contract. More importantly, there was nothing in the presentations that was capable of contradicting a limitation to a 12-month period in the Procurement documents themselves. Of course, the actual understanding held by any RWIND tenderer, including the claimant, is irrelevant.

68. Whether there is any properly relevant matter concerning the surrounding circumstances that might have affected the understanding of the RWIND tenderer, I shall consider later. Now I turn to consider the Procurement documents.

69. Regulation 2(1) contains the following definition:

> "'procurement document' means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents".

This definition clearly includes the Contract Notice, the ITT, the Service Specification and the Standard Terms. There was an issue between the parties as to whether the definition would encompass the home page of the Portal (paragraph 17 above). The issue is, perhaps, of limited importance, because the home page would certainly be within the presumed knowledge of the RWIND tenderer and would thus inform the sense in which the procurement documents were to be understood. It does, though, have some importance: there is a difference between the documents that are to be understood and matters that merely inform the understanding of those documents. In my judgment, the home page would properly be considered a "document"; it was produced by the defendant as contracting authority; and, albeit in summary form, it describes—and is therefore properly taken to have been produced to describe—elements of the Procurement, namely the estimated value of the contract, the type of contract and the contract duration. Accordingly, in agreement with the submissions of Mr Knibbe, I consider that the Portal home page was a procurement document within the terms of the definition.

70. The Portal home page is significant, because of its clarity. As well as showing the contract duration as 12 (which can only mean 12 months, as Mr Williams acknowledged), it states plainly the estimated value of the contract at £122,000. The Contract Notice also stated the "Total quantity or scope of tender" at "[£]122,000". In

my view, that figure is to be taken as the contracting authority's estimate of the total amount payable and therefore as the basis of the calculation of the estimated value of the Procurement for the purposes of regulation 6(1).

71. It seems to me that any fair reading of the remainder of the Procurement documents is consistent with that conclusion. The ITT stated that the "maximum annual budget" for the contract was £122,000. Mr Williams submitted that the word "annual" indicated continuation across more than one year. I do not agree. The word "annual" can mean "of or pertaining to the year; reckoned, payable or engaged by the year" (Oxford English Dictionary, first definition). It is unnecessary to interpret the word "annual" in the ITT to mean anything other than "for the year". As the Contract Notice itself had stated that the total quantity of the tender was £122,000, and as the Portal home page had shown the estimated value of the contract as £122,000 and the duration as being 12 (scil. months), it seems to me rather perverse to suppose that use of the word "annual" had any other meaning. (The claimant's understanding of the word is irrelevant, for reasons already mentioned. I observe with interest, however, that the costings included with the claimant's bid included figures—for recruitment, building costs, mobile telephones, equipment and furnishings, and IT-related costs—that would hardly be likely to be recurring costs.)

72. On behalf of the claimant, however, Mr Williams relied both on matters contained within the Procurement documents and on relevant circumstances within the knowledge of a RWIND tenderer in support of the contention that there was no indication of a total price and that the contract did not have a fixed term.

- The matters particularly relied on in the Procurement documents were the following. The Contract Notice did not state whether the contract was for a fixed term or, if it was, what that term would be. The ITT, though stating an annual budget, did not go further and state a total price or a fixed term. The Service Specification was silent on both points, but it referred in section 11 to "a six-monthly review" with a report of "annual accounts"; the reference to TUPE in section 15, in the context of a new service, made it "reasonable to expect the service to operate for at least two years" (statement of Alun Thomas, the claimant's Chief Executive); and the requirement in section 10.11 for staff to have a development plan "on an annual cyclical basis" points to a total length of contract of more than one year. In the Standard Terms, clause 2.3 of Schedule 1, taken with clause 8 of Schedule 2, had the effect that the contract itself contained provision for its own extension.

- Regarding the relevant surrounding circumstances that would be known to an RWIND tenderer, the matters relied on were set out in the statement of Mr Alun Thomas in response to the defendant's application. First, "[It] is not an uncommon practice to award a pilot which then continues post pilot without a further procurement exercise. … This is certainly what we as service providers expect" (paragraph 16). Second, "Commercial leases tend to be for periods of five years or longer … This was entirely consistent with the contract being let for three years after the initial pilot project" (paragraph 17).

73. In my judgment, these points do not show either that it is arguable that regulation 6(19)(b) applies or that there is any matter requiring resolution by evidence at trial. I have already remarked on the provisions in the Procurement documents showing

clearly the fixed term and the estimated value of the contract. Taken by itself, the reference to a "six-monthly review" could indicate a longer contract period than one year; in context, however, it is indicative only of a progress report, not of some ongoing contract after the 12-month period. The same applies to the reference to "annual accounts", which, whatever else it might mean, cannot possibly refer to accounts for a full 12-month period of the operation of the Sanctuary Service at the half-way stage of the pilot. The provisions of section 10.11 merely require the successful tenderer to have good employment practices.

74. The claimant's reliance on the Standard Terms is misplaced. Clause 2.3 of Schedule 1 makes clear that no extension is permissible for a longer duration than was originally advertised. The duration advertised was 12 months. The power to extend in clause 8 of Schedule 2 cannot therefore permit any actual extension of the contract in this particular Procurement. Extension of a contract is a modification of the contract and, for the purpose of preventing avoidance of the public procurement regime, is regulated by regulation 72 of the 2015 Regulations, which makes specific provision for the circumstances in which "[c]ontracts … may be modified without a new procurement procedure in accordance with [Part 2]". Mr Williams made no reference to it, no doubt because it is clear that none of it can avail the claimant. I shall not set out the detailed provisions of regulation 72. However, in light of the claimant's reliance on words, phrases or passages in the Procurement documents that are said to imply a continuation of the services under the contract beyond the 12-month period, I note the opening words of the first case of permissible modification in regulation 72(1)(a): "where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents <u>in clear, precise and unequivocal review clauses</u>" (my emphasis).

75. In the circumstances, the first point made by Mr Alun Thomas has no force. The understanding or expectation of the claimant as a service provider is irrelevant, for reasons already explained. The second point he makes also goes nowhere. The manner in which a tenderer proposes to provide the necessary premises is a matter for that tenderer, as are the terms on which it takes any necessary lease, and not even the claimant suggests that the award of the contract for the pilot provided any guarantee of an extension for the remainder of the intended project.

76. In his oral submissions, Mr Williams said that the defendant's estimate of the total amount payable, namely £122,000, was "very suspicious" in that it was only just below the threshold in regulation 5(1)(b). He questioned whether the figure might have been manipulated with a view to avoiding the application of the 2015 Regulations and whether there might be an infringement of regulation 6(5). There is, however, no allegation of deliberate deflation or manipulation of figures and no evidence to justify such an allegation. Indeed, the evidence of Mr Mark Lewis, confirmed by an exchange of emails that he exhibited to his statement, was that in the course of preparing the Procurement he raised the question of applicable thresholds with Mr Jack Robinson, who informed him that the relevant threshold would be that for the "Light Touch" regime, namely the threshold in regulation 5(1)(d). Whether rightly or wrongly, the defendant did not think that the threshold in regulation 5(1)(b)

was the relevant one. There is no basis for any suggestion that it was attempting to avoid the application of that threshold.[1]

77. In the circumstances, in my judgment, it is possible and appropriate to hold now that the value of the Procurement was below all of the thresholds in regulation 5(1) and that the Procurement was not one to which Part 2 of the 2015 Regulations applied. The claimant has no realistic prospect of establishing at trial that the value of the Procurement was £122,976 or higher. Accordingly, the claim under sections 89 and 91 of the 2015 Regulations must fail.

78. If this conclusion were wrong and there were a reasonably arguable case that the value of the Procurement was £488,000, it would be necessary to decide which of the thresholds in regulation 5(1) was the applicable one. For completeness, I address that question now.

The applicable threshold

79. If the value of the Procurement was £488,000, Part 2 of the 2015 Regulations applied to it unless the applicable threshold was that under regulation 5(1)(d), namely £663,540.

80. The question is whether the Procurement should properly be considered to be (i) for a public service contract awarded by a central government authority (regulation 5(1)(b)) or (ii) for a public service contract "for social and other specific services listed in Schedule 3" (regulation 5(1)(d)).[2] The parties were agreed that that question is to be answered in accordance with regulation 4(1)(b)(i), by identifying the "main subject-matter" of the contract as "determined in accordance with which of the estimated values of the respective services … is the highest."

81. The rationale for the different treatment of contracts to which regulation 74 and Schedule 3 apply (which are subject to what is known as the Light Touch Regime) is set out in recital 114 to the Public Contracts Directive:

> "Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided

[1] As Mr Robinson explains in his own witness statement, it was his understanding of the applicable threshold that led him to include a "voluntary" standstill period in the Procurement as a matter of what he considered good practice.

[2] I do not consider that the Procurement can have been under regulation 5(1)(c), because the defendant is a central government authority and not a sub-central contracting authority. Regulation 2(1) defines "central government authorities" to mean "the Crown and all the bodies listed in Schedule 1 (whether or not they perform their functions on behalf of the Crown)"; the definition expressly excludes Her Majesty in her private capacity. The expression "sub-central contracting authorities" is defined to mean "all contracting authorities which are not central government authorities". Schedule 1 lists, as one of the central government authorities, "Welsh NHS Bodies". The defendant is one of six Local Health Boards in Wales established under article 3 of the Local Health Boards (Establishment and Dissolution) (Wales) Order 2009 and Schedule 1 to that Order. The Order was made pursuant to section 11 of the National Health Service (Wales) Act 2006. Section 11 is in Part 2 of that Act, which is titled "Health Service Bodies". Apart from Local Health Boards, the other Health Service Bodies provided for in Part 2 are NHS Trusts and Special Health Authorities. In my judgment, therefore, the defendant is a Welsh NHS Body and thus a central government authority for the purposes of regulation 5(1)(b).

> within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.
>
> Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.
>
> Contracts for services to the person above that threshold should be subject to Union-wide transparency."

82. Identification of the relevant categories of services to the person is by means of a standard classification system in accordance with the Common Procurement Vocabulary ("CPV") in Annex 1 of Regulation (EC) No. 2195/2002 as substituted by Regulation (EC) No. 213/2008. The CPV consists of a main vocabulary and a supplementary vocabulary. It is the main vocabulary that is relevant to this case. Annex 1 explains the main vocabulary as follows:

> "The main vocabulary is based on a tree structure comprising codes of up to nine digits associated with a wording that describes the supplies, works or services forming the subject of the contract.
>
> The numerical code consists of 8 digits, subdivided as follows:
>
> - The first two digits identify the divisions (XX000000-Y)
> - The first three digits identify the groups (XXX00000-Y)
> - The first four digits identify the classes (XXXX0000-Y)
> - The first five digits identify the categories (XXXXX000-Y)
>
> Each of the last three digits gives a greater degree of precision within each category.
>
> A ninth digit serves to verify the previous digits."

83. By way of a brief illustration of the way in which the tree structure works (and adding emphasis to show the structure):

- Code **85**000000-9 is for the division "Health and social work services".
- Code **851**00000-0 is for the group "Health services".
- Code **8511**0000-3 is for the class "Hospital and related services".
- Code **85111**000-0 is for the category "Hospital services".

- There then follow several codes, each commencing 85111, for various specific hospital services: for example, Code 85111320-9 ("Obstetrical hospital services").

- Code **85112**000-7 is a new category, "Hospital support services"; some further codes, all commencing 85112, identify precise cases within that category.

- Code **8512**0000-6 is a new class, "Medical practice and related services", within the group "Health Services". There then follow categories within that class and precise instances of those categories. Several further classes within the group "Health services" follow, among them "Dental practice and related services" (Code **8513**0000-9) and "Miscellaneous health services" (Code **8514**0000-2).

- Then there is a new group, "Veterinary services", with Code **852**00000-1.

- The next group is "Social work and related services", with Code **853**00000-2. The classes within that group are "Social work services" (Code **8531**0000-5) and "Social services" (Code **8532**0000-8).

- Across the codes as a whole, not every group has classes, not every class has categories, and not every category is further ramified by means of the final three digits. It depends on the perceived need for further specificity.

84. Recitals 118 and 119 of the Public Contracts Directive are of some assistance in the interpretation and application of the CPV codes:

> "(118) In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime.
>
> (119) It is appropriate to identify those services by reference to specific positions of the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. In order to avoid legal uncertainty, it should be clarified that reference to a division does not implicitly entail a reference to subordinate subdivisions. Such comprehensive coverage should instead be

> set out explicitly by mentioning all the relevant positions, where appropriate as a range of codes."

85. Mr Knibbe advanced a number of submissions relating to the interpretation of the CPV, as follows:

    1) The tree structure informs the interpretation of the individual codes.

    2) Each higher-level code is broader than the sum of its parts. Thus the subject-matter of the groups within a division will not necessarily be exhaustive of the contents of that division.

    3) The categorisations, having an EU-wide application and therefore applying to different social and commercial cultures, do not necessarily correspond to the categorisations that would be natural in the UK. Thus, for example, the division "Health and social work services" contains the group "Veterinary services" (which is also, it may be noted, distinct from the group "Health services").

    4) A public service contract may involve different services that are covered by different codes.

    5) "The 'single classification system' is intended to cover all supplies, works and services. If there is not a *specific* code for a service, that service is covered by the *most appropriate* code" (skeleton argument, paragraph 32(a)).

    6) Whether a particular service is covered by a particular code is a "hard-edged" question; it is not a matter within the discretion of the contracting authority.

86. I consider that those propositions are correct; however, it is unnecessary for me to express a concluded view on proposition (5) in the form stated. Propositions (1) and (2) follow from the logic of the tree structure and from recital 119. Proposition (3) simply means that the designation of a particular service turns on the interpretation and application of the codes within the tree structure, not on whether the resulting classification accords with conventional usage in any particular country. Proposition (4) is, I think, obvious.

87. Proposition (5) seems to me to accord with the intention of the CPV and to gain support from recital 119. However, it may be arguable that recital 119 does not necessarily preclude the possibility of a lacuna in the subordinate divisions by reason of a failure to mention all relevant positions. Nevertheless, even if such a lacuna were possible (that is, the service in question were not identified by the lowest part of the tree structure), it would follow from propositions (1) and (2) that the service might fall within a higher level of the tree structure, and that those higher levels would properly be interpreted by reference to the lower—and, where appropriate, coordinate—levels and by analogical reasoning from the contents of those levels. Thus the meaning of the high-level description of a division would be shown by the description of the classes; and the meaning of the description of a class would be shown by the description of the groups (and, perhaps, that of any coordinate classes); and that of the groups by that of the classes (and, perhaps, that of any coordinate

groups). Accordingly, if no specific code expressly referred to a particular service, it might nevertheless be possible to identify a code that did apply to that service.

88. As for proposition (6), the very purpose of the use of the CPV requires that the application of a particular code to a particular service be a "hard-edged" question. Thus the codes are binding on the contracting authority, and the use it makes of them is subject to review by the domestic courts, which must ensure that the services in question and the CPV codes correspond. See Case C-411/00, *Felix Swoboda GmbH v Österreichische Nationalbank* EU:C:2002:660, [2002] ECR I-10567 at [49]-[51] and [61]-[63]; and Case C-465/17, *Falck Retungsdienste GmbH v Stadt Solingen* EU:C:2019:234, [2019] PTSR 1684 at [27] and [36]-[50].

89. In the present case, the relevant services identified in Schedule 3, and thus within the scope of regulation 5(1)(d), are "from 85000000-9 to 85323000-9", comprising the entire division "Health and social work services". The parties are at odds as to whether the appropriate classification of the services in the Procurement was within that division.

90. For the claimant, Mr Williams' primary submission was that the correct categorisation of the services in the Procurement is a complex matter of fact that will have to be determined at trial on the basis of the oral evidence and the Procurement documentation. I do not agree. It can be determined now, as a matter of the construction of the Procurement documents and the application of the CPV codes. It has not been explained what oral evidence would be relevant or how it could be relevant. In my judgment, it simply could not be relevant. Indeed, if it were otherwise, it would be hard to know how the appropriate codes—and thus the applicable procurement regime—could be known at the procurement stage. The estimated value of a procurement is to be calculated prospectively, not retrospectively: see regulation 6(7).

91. I agree with the submission of Mr Knibbe that the essence of the services to which the Procurement related was support to individuals experiencing crisis with the aim of preventing the onset of mental health illness requiring clinical intervention. I also agree that no specific CPV code applies to a service of that nature and that the requirement is to find the code or codes most appropriate to what was to be within the scope of the contract.

92. The claimant's case is that the Contract Notice wrongly categorised the services (this is, in part, accepted by the defendant). Paragraph 18 of the particulars of claim states:

> "Instead, the services should have more properly been categorized principally under CPV Codes 98113000-8 (services furnished by specialist organisations), 98133000-5 [scil. 98133100-5] (civic betterment and community facility support services, including 98300000-6 (miscellaneous services)), 98334000-3 (wellness services), and 45215221-2 (day care centre construction services), together with ancillary services under CPV Codes 5532000-9 (meal serving services), 55400000-4 (beverage serving services), 60140000-1 (non-scheduled passenger services) and 72223000-0 (IT services)."

93. In my judgment, the categorisation of the principal services proposed by the claimant is clearly wrong. I deal with the specific codes in turn.

94. Code 98113000-8 is the category code for "Services furnished by specialist organisations". The class is "Services furnished by business, professional and specialist organisations" (code 98110000-7). The group is "Membership organisation services" (code 98100000-4). The division is "Other community, social and personal services" (code 98000000-3); this is the final division in the CPV. The groups within the division are, in addition to "Membership organisation services", the following: "Equal opportunities consultancy services" (code 98200000-5); "Miscellaneous services" (code 98300000-6); "Private households with employed persons" (code 98500000-8); "Services provided by extra-territorial organisations and bodies" (code 98900000-2). The group for "Miscellaneous services" includes a large number of varied classes and categories, including laundering, pressing and dyeing services, hair, beauty and cosmetic services, Turkish bath and spa services, accommodation services, portering services, janitoring services, car park management services, port management services, funeral services, cremation services, undertaking services, and dog kennel services. There is clearly a distinction between the wide range of "Miscellaneous services"—many of which could be provided by business or even professional entities—and "Membership organisation services". "Membership organisation services" include not only "Services furnished by business, professional and specialist organisations" but two further classes, namely "Services furnished by trade unions" (code 98120000-0) and "Miscellaneous membership organisation services" (code 98130000-3). The category and specific codes within the class "Miscellaneous membership organisation services" are for the following services: "Religious services"; "Services furnished by political organisations"; "Services furnished by social membership organisations"; "Civic betterment and community facility support services"; "Services provided by youth associations."

95. The following conclusions may be drawn. First, the division "98" is residual, in the sense that it is concerned with services that are not appropriately categorised under earlier divisions (cf. "Other" in the description of services). Second, the group "981" concerns services provided by a range of membership bodies, such as guilds, associations, clubs, political bodies and religious bodies. Mr Knibbe suggested that training or networking events provided by a trade guild would be an example; I agree. Third, the codes 98000000-3 and 98100000-4 are inappropriate for the services in the Procurement, because (a) the services are appropriately dealt with under other codes, as explained below, and in any event (b) the Procurement was not for "Membership organisation services".

96. This second reason also disposes of the suggestion that code 98133100-5 ("Civic betterment and community facility support services") applies; the first reason applies as well. However, this code is in fact one of those identified in Schedule 3, so if it were the appropriate designation for the major services to be provided pursuant to the Procurement it would indicate that regulation 5(1)(d) was applicable.

97. As has been explained, code 98300000-6 is the group code for a wide range of "Miscellaneous services". Code 98334000-3 is the category code for "Wellness services". The class code is 98330000-5, "Physical well-being services". The other categories within the class are for "Turkish bath services", "Spa services" and "Massage Services". It is therefore clear that "Wellness services" have to do with

bodily health and vitality. The Procurement related to quite different matters. Code 98333000-5 is inappropriate.

98. The other principal code advanced by the claimant as being appropriate is code 45215221-2, "Daycare centre construction work". That is a specific code within the category 45215000-7, "Construction work for buildings relating to health and social services, for crematoriums and public conveniences". The class is code 45210000-2, "Building construction work". The group is code 45200000-9, "Works for complete or part construction and civil engineering work". The division is code 45000000-7, "Construction work". None of this has anything to do with the present case. The defendant was not seeking construction services. The successful tenderer would have to provide the services at suitable premises; conceivably, though not practically, it might choose to construct them in order to have premises it could use, but that would be its own affair. The services required by the defendant were the services provided within the premises, not the construction of premises.

99. It is unnecessary to burden this judgment with a discussion of the ancillary services proposed by the claimant. None of them could affect the identification of the main subject-matter of the contract.

100. The Contract Notice identified four codes; see paragraph 14 above. The defendant accepts that the third of those codes, for "Residential health facilities services", is wrong but it maintains that the other three are correct. Accordingly, it contends that group code 85100000-0 ("Health services"), or the category code 85323000-9 ("Community health services"), is appropriate. Alternatively, it relies on the higher-level divisional code 85000000-9 ("Health and social work services"). By its defence it proposes that two further codes, both listed in Schedule 3, might be appropriate: code 85312300-2 ("Guidance and counselling services"), and code 85312400-3 ("Welfare services not delivered through residential institutions").

101. Division 85, "Health and social work services") contains the following groups: 851 ("Health services"), 852 ("Veterinary services": an example, I think, of the way in which the CPV does not accord with common usage in this country), 853 ("Social work and related services"). Group 851 is extensive. Its classes are as follows: 8511 ("Hospital and related services"), 8512 ("Medical practice and related services"), 8513 ("Dental practice and related services"), 8514 ("Miscellaneous health services"), 8515 ("Medical imaging services"), 8516 ("Optician services"), and 8517 ("Acupuncture and chiropractor services"). The only class that could apply is 8514, "Miscellaneous health services". However, the categories do not appear to be applicable: the services were not to be provided by medical personnel (category 85141); and, both as a matter of definition and with regard to the specific codes within the category, it is hard to see that they properly fit within the scope of "Paramedical services" (category 85142). It is possible that the class code 85140000-2 might nevertheless apply. However, if (as I think) the meaning of the class is shown by the other relevant parts of the tree, this seems unlikely.

102. Group 853, "Social work and related services", contains two classes: 8531 ("Social work services") and 8532 ("Social services"). Class 8531 contains two categories: 85311 ("Social work services with accommodation"—obviously not applicable in the present case) and 85312 ("Social work services without accommodation"). The specific codes in category 85312 include code 85312300-2 ("Guidance and

counselling services"), which in turn is ramified by more particular codes for "Guidance services", "Counselling services" and "Family-planning services". Apart from the last one, these codes seem appropriate for the services in the Procurement, though they were not included in the Contract Notice. Class 8532, "Social services", contains only three categories and no more specific codes: 85321 ("Administrative social services"), 85322 ("Community action programme") and 85323 ("Community health services"). As the health services in the last of these categories are clearly outside group 851 ("Health services"), it is possible that they would include the services in the Procurement. I should, however, be more inclined to think that category 85312 was applicable.

103. Whether the appropriate code for the primary services to be provided under the contract was 85312300-2 (or one of its more specific subdivisions) or, less probably, 85323000-9, the code was within Schedule 3. Whatever ancillary services may have been provided, including for example the provision of food and drink, far the greater part of the contract cost must have been the staffing costs for the primary services. Accordingly, the effect of regulation 4(1)(b)(i) of the 2015 Regulations is that the Procurement fell within regulation 5(1)(d). Therefore the applicable threshold was £663,540. Therefore, even if the claimant is correct that the value of the Procurement was £488,000, the claim under regulation 89(1)(a) and regulation 91 would fail.

Principles and obligations of retained EU Law

104. Because the Procurement was below the threshold for the application of Part 2 of the 2015 Regulations, the claimant cannot bring a claim for breach of retained EU law pursuant to sections 89 and 91.

105. Nevertheless, the claimant contends that the defendant was subject to the general principles and enforceable obligations of retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 ("the 2018 Act"). It relies on "the general principles of equal treatment, transparency, non-discrimination, non-arbitrariness, proportionality, good administration, procedural fairness, and the protection of legitimate expectations" (particulars of claim, paragraph 52). It also contends that the defendant was required to conduct the Procurement, including its evaluation of the tenders submitted, "in a manner which was free from manifest error" (particulars of claim, paragraph 53).

106. Section 3 of the 2018 Act, as amended, provides in part:

> "(1) Direct EU legislation, so far as operative immediately before IP completion day [i.e. immediately before 11 p.m. on 31 December 2020], forms part of domestic law on and after IP completion day.
>
> …
>
> (5) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary)."

107. Section 4 of the 2018 Act provides:

> "(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day—
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
>
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—
>
> (a) form part of domestic law by virtue of section 3,
>
> (aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
>
> (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
>
> (3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary)."

108. Section 5(6) of the 2018 Act gives effect to Schedule 1 to the 2018 Act.

109. Section 6 of the 2018 Act provides in part:

> "(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, …
>
> (7) In this Act—

> 'retained case law' means—(a) retained domestic case law, and (b) retained EU case law;
>
> 'retained domestic case law' means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they—(a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
>
> 'retained EU case law' means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—(a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
>
> 'retained EU law' means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);
>
> 'retained general principles of EU law' means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—(a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1, (as those principles are modified by or under this Act or by other domestic law from time to time)."

110. Schedule 1 to the 2018 Act provides:

> "*Challenges to validity of retained EU law*
>
> 1
>
> (1) There is no right in domestic law on or after IP completion day to challenge any retained EU law on the basis that, immediately before IP completion day, an EU instrument was invalid.
>
> (2) Sub-paragraph (1) does not apply so far as—

(a) the European Court has decided before IP completion day that the instrument is invalid, or

(b) the challenge is of a kind described, or provided for, in regulations made by a Minister of the Crown.

(3) Regulations under sub-paragraph (2)(b) may (among other things) provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the United Kingdom.

General principles of EU law

2

No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case).

3

(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after IP completion day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.

Rule in Francovich

4

There is no right in domestic law on or after IP completion day to damages in accordance with the rule in *Francovich*.

Interpretation

5

(1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to

> be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after IP completion day by virtue of section 2, 3, 4 or 6(3) or (6) and otherwise in accordance with this Act.
>
> (2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day."

111. Section 8 of the 2018 Act provides in part:

> (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—
>
> (a) any failure of retained EU law to operate effectively, or
>
> (b) any other deficiency in retained EU law,
>
> arising from the withdrawal of the United Kingdom from the EU.
>
> (2) Deficiencies in retained EU law are where the Minister considers that retained EU law—
>
> (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
>
> …
>
> …
>
> (5) Regulations under subsection (1) may make any provision that could be made by an Act of Parliament."

112. In exercise of the powers conferred by section 8 of the 2018 Act, the Secretary of State for Business, Energy and Industrial Strategy made the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019 ("the Two Freedoms Regulations"), which came into effect on 31 December 2020. Regulation 2 ("Cessation of freedom of establishment") provides in part:

> "(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—
>
> (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
>
> (b) are derived (directly or indirectly) from—

> (i) Article 49 of the Treaty on the Functioning of the European Union;
>
> …
>
> cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

Regulation 3 ("Cessation of free movement of services") provides in part:

> "(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—
>
> (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
>
> (b) are derived (directly or indirectly) from—
>
> (i) Articles 56 and 57 of the Treaty on the Functioning of the European Union;
>
> …
>
> cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

Regulation 4 ("Cessation of discrimination on the grounds of nationality") provides in part:

> "The prohibitions on the grounds of nationality which—
>
> (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
>
> (b) are derived from—
>
> (i) Article 18 of the Treaty on the Functioning of the European Union;
>
> …
>
> so far as they relate to the cessation effected by regulations 2(1)(b) and 3(1)(b), cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

113. In the exercise of powers conferred by *inter alia* section 8 of the 2018 Act, the Minister for the Cabinet Office made the Public Procurement (Amendment etc) (EU Exit) Regulations 2020 ("the Procurement Amendment Regulations"), which came into force on 31 December 2020. Regulation 25 provides in part:

> "Any rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of public procurement which—
>
> (a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and
>
> (b) are derived from—
>
> (i) Article 18 of the Treaty on the Functioning of the European Union;
>
> …
>
> cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) when this regulation comes into force, to the extent that they do not so cease by virtue of regulation 4 of the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019."

114. For the defendant, Mr Knibbe's argument was, in brief summary, as follows. A claim for relief on the basis of a breach of general principles of EU law is precluded by Schedule 1, paras 3 and 4, to the 2018 Act. Any attempt to rely on domestic law as incorporating those principles is precluded by regulations 2(1)(b)(i), 3(1)(b)(i) and 4(1)(b) of the Two Freedoms Regulations, because the relevant rights, liabilities etc. derive from Article 18, 49 or 56 of the Treaty on the Functioning of the European Union ("TFEU") and have thus ceased to be part of UK domestic law. The underlying rationale of the principles derived from TFEU—namely, that the procurements were of cross-border interest within the EU internal market—has ceased to apply.

115. For the claimant, Mr Williams's argument was, in brief summary, to the following effect. The general principles of EU law relied on in paragraphs 52 and 53 of the particulars of claim were well recognised both by the CJEU and by domestic courts before 31 December 2020. Schedule 1, para 3, to the 2018 Act, when read in the context of para 2 of Schedule 1, is only intended to prevent any *new* general principles of EU law giving rise to a cause of action; it does not prevent such principles being relied on insofar as they were already part of general principles of EU law recognised by the courts, including the domestic courts, before 31 December 2020; therefore it does not preclude a claim based on the general principles relied on by the claimant. The provisions of the Two Freedoms Regulations and the Procurement Amendment Regulations do not preclude a claim in which no breach of any of the specified Articles is alleged. As for the underlying rationale of cross-border interest: even if (which is not accepted) the Procurement had no cross-border interest within the EU, it had a cross-border interest within the UK internal market and the requirements of retained EU law would still be applicable.

116. A convenient starting point for consideration of these arguments is the definitions in section 6 of the 2018 Act. To paraphrase: "retained EU law" is anything that continues to be part of domestic law by virtue of (for present purposes) section 4 of the 2018 Act. Thus it is *domestic* law. By virtue of section 6(3) of the 2018 Act, any

question as to the meaning or effect of EU retained law is to be decided in accordance with any "retained case law" (whether of the CJEU or the domestic courts) and any "retained general principles of EU law" (general principles of EU law existing as at 31 December 2020) so far as they relate to retained EU law that is preserved in domestic law by (here) section 4 of the 2018 Act and is not otherwise excluded. Accordingly, "retained EU case law" and "retained general principles of EU law" constitute interpretative rules for domestic law that is "retained EU law" but are not *per se* "retained EU law", though the definitions do not preclude them being so. (I should not have thought that section 6(3), by giving retained general principles of EU law an interpretative authority, makes them part of domestic law; the contrary seems indicated by their strictly interpretative function in specific cases. Given that limited function, the answer to this rather Dworkinesque question may not much matter.)

117. In my view, Schedule 1, para 2, to the 2018 Act makes no provision for what <u>is</u> part of domestic law. It simply provides that general principles of EU law that were first recognised as such after 2020 are <u>not</u> part of domestic law; though the provision necessarily implies that general principles of EU law are capable of being part of domestic law. This reading of Schedule 1, para 2, is contrary to that stated by Green LJ (with whom Coulson and Haddon-Cave LJJ agreed) in *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454, where he stated at [64]:

> "Schedule 1 paragraph (2), entitled 'General principles of EU law', makes general principles part of domestic law provided they were recognised in relevant case law prior to IP completion day:
>
> 'No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court of Justice in a case decided before IP completion day (whether or not a[s an] essential part of the decision in the case)'."

I respectfully disagree that Schedule 1, para 2, has the effect suggested by Green LJ. (Of course, general principles of EU law may be part of domestic law for some other reason—possibly, by virtue of section 6(3).) I also do not think that the remarks at [64] form part of the *ratio decidendi* of the *Lipton* case: see the statement of principles relevant to the decision in that case at [83], in particular principles (i), (ii), (v) and (vi). The point of para 2 of Schedule 1, I should think, is simply to make clear that the contents of domestic law in the future are a domestic matter; the recognition by the CJEU of new principles of EU law is in no way constitutive of domestic law.

118. Whether or not my reading of Schedule 1, para 2, be correct, I reject Mr Williams' submission that para 3 is to be read subject to para 2. There is nothing in Schedule 1 that suggests such a reading, which is contrary to the plain meaning of para 3. Mr Williams' reading is also contrary to Schedule 1, para 5, which makes clear that references in the Schedule (including para 3) "to any general principle of EU law or the rule in *Francovich* are to be read as references to that principle … or rule so far as it would otherwise continue to be, or form part of, domestic law" after 2020 by virtue of the 2018 Act. In my judgment, therefore, para 3 is straightforward: general principles of EU law do not ground a cause of action in domestic private or public law.

119. It is of assistance to consider the position regarding *Francovich* claims, under Schedule 1, para 4. A *Francovich* claim for damages is grounded directly on EU law: see Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5357, at [38]-[41]. Such claims are recognised by and justiciable in the domestic courts of those states to which they apply. Paras 4 and 5 of Schedule 1 recognise that sections 2, 3, 4 and 6 might have the effect that the rule in *Francovich* would continue to be (part of) domestic law; their effect is that the rule will nevertheless not so continue (cf. para 5(1): "so far as it would otherwise continue …"). Two particular points may be noted as being important in this case.

    1) The recognition of *Francovich* claims in domestic law before 2021—and, in that sense, the status of the rule in *Francovich* as domestic law—is the premise of paras 4 and 5. But it is clearly not open to a claimant to bring a claim for breach of EU law on the basis that, although such a claim can no longer be grounded on EU law, it can be brought as a freestanding claim under domestic law. Mr Williams submitted that, although no *Francovich* claim for damages could be maintained, the claimant could bring a claim in domestic law for breach of the general principles of EU law; he expressly said that such a claim would have to meet the *Francovich* conditions of state liability. In my judgment, that cannot be right. Such a claim is a *Francovich* claim by another name. Previously, domestic courts entertained such claims because EU law required that redress be given. The claims were based on EU law but were recognised and available in domestic law (cf. section 4 of the 2018 Act). Mr Williams' argument would require that, whereas previously the principle of the supremacy of EU law was the basis of the domestic recognition of *Francovich* claims, that former recognition has given such claims an independent status that circumvents Schedule 1, paras 4 and 5. I reject that suggestion. The position now is that a claim for damages must rest on a cause of action in domestic law (breach of statutory duty, tort, breach of contract, or whatever).

    2) The logic of paras 4 and 5 confirms the meaning of paragraph 3 regarding general principles of EU law. General principles of EU law do not ground a cause of action in domestic law. As with *Francovich* claims for damages, it is irrelevant that domestic courts have given effect to the EU law and to that extent made it part of domestic law: this argument does not preserve the *Francovich* right to damages for failure to comply with EU law (paras 4 and 5(1)); similarly, it does not preserve the right to bring a claim, of whatever sort, for failure to comply with general principles of EU law (paras 3 and 5(1)).

120. The upshot is that the status of general principles of EU law is that they are a form of interpretative rule as regards any question concerning the validity, meaning or effect of any retained EU law: section 6(3) of the 2018 Act.

121. Therefore the claimant's claim in paragraphs 52 and 53 of the particulars of claim, which is based squarely on general principles of EU law that are said to have been recognised in domestic law, is untenable. (The obligation not to commit a manifest error in the evaluation of tenders was advanced before me as included in the general principle of EU law requiring good administration.)

122. If this conclusion were wrong, I should nevertheless accept the further submissions of Mr Knibbe that (1) the lack of a sufficient cross-border interest precludes the claims based on general principles of EU law and (2) the provisions of the Two Freedoms Regulations anyway preclude such claims.

123. Articles 18, 49 and 56 of TFEU are as follows:

> "*Article 18*
>
> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."
>
> "*Article 49*
>
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."
>
> "*Article 56*
>
> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

124. Recital 1 of the Public Contracts Directive, which identifies the rationale of the regulation of public procurement and the derivation and basis of the underlying principles:

> "(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain

> value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition."

125. The position regarding below-threshold contracts was stated as follows by the CJEU in Case C-298/15, *Borta* EU:C:2017:266 at [36]:

> "[W]ith respect to the award of a contract which, having regard to its value, does not come within the scope of Directive 2004/17, the Court may take account of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof and the principles of equal treatment and non-discrimination and the obligation of transparency which derive from them, provided that it is of certain cross-border interest. Although not covered by Directive 2004/17, such contracts are still subject to compliance with those rules and principles (see, to that effect, judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 22 to 24; of 18 December 2014, *Gennerali-Providencia Biztositó* [sic], C-470/13, EU:C:2014:2469, paragraph 27; and of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19)."

(See, to precisely similar effect, Case C-699/17, *Allianz Vorsorgekasse* EU:C:2019:290 at [49].)

126. In *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749, the Court of Appeal explained the position regarding the application of the general principles to the corresponding Directive and Regulations then in force:

> "27. Even where the tendering procedure in Directive 2004/18 and the 2006 Regulations does not apply, the Court of Justice has held that a contracting authority must apply the principles of non-discrimination and transparency in the Treaty before awarding a public services contract: see *Telaustria Verlags GmbH v Telekom Austria AG* (Case C-324/98) [2000] ECR I-10745. In these circumstances, the contracting authority must undertake a 'degree of advertising sufficient to enable the services market to be opened up to competition': see the *Telaustria* case, para 62. This apparently activist approach of the Court Justice is grounded in the fundamental freedoms guaranteed by the Treaty, including the freedom to provide services contained in article 56 FEU.
>
> 28. However, the jurisprudence only applies if there is shown to be the requisite degree of cross-border interest in tendering for the contract: see *Commission of the European Communities v Ireland* (Case C-507/03) [2007] ECR I-9777, paras 29—33,

> where the Court of Justice so held in relation to a contract not subject to the tendering requirements of Directive 2004/18 …
>
> …
>
> 30. The Court of Justice uses the words 'of certain cross-border interest'. We doubt whether the Court of Justice intended to hold that cross-border interest had been shown beyond reasonable doubt. No argument has been addressed to the relevant test. In relation to the type of contract with which we are concerned, it is clear from *Commission v Ireland* (Case C-507/03) that there is no presumption that cross-border interest exists. Clearly there must be a realistic prospect of cross-border interest. It may be that, in the interests of protecting contracting authorities, a higher test than reasonable prospect applies so that the contracting authority would only be bound to follow the general principles in the Treaty if it was likely that there was cross-border interest. But a higher test would work to the disadvantage of potential tenderers in other member states and would be applied on the basis of imperfect information since *ex hypothesi* there would have been no publicity for the proposal. It is not necessary for us to resolve this question on this appeal. We will proceed on the basis most favourable to Ms Chandler that if there is a realistic prospect of cross-border interest, the principles of the Treaty are engaged. …"

127. It is clear, accordingly, that the general principles relate to the operation of the single internal EU market and that, in the absence of specific legislative provision (such as the Public Contracts Directive), they only regulate procurements where there is at least a realistic prospect of cross-border interest. In view of the nature of the services and the value of the contract, I should regard it as obvious that there was no such prospect in respect of the Procurement. That by itself would dispose of the claim based on general principles of EU law.

128. Mr Williams submitted that the principles might nevertheless have application within the UK internal market. As he did not explain or develop that submission, it goes nowhere. At all events: first, the relevant general principles of EU law derive from TFEU, which concerns the EU internal market not the UK internal market; second, if the general principles of EU law would not, in the case of a contract lacking a cross-border interest, have regulated the UK internal market before the UK withdrew from the EU, it would have to be explained how they could do so after withdrawal; third, the UK internal market is regulated by the United Kingdom Internal Market Act 2020; fourth, I was not referred to any provisions of that Act; fifth, no case on the basis of that Act is alleged in the particulars of claim.

129. Finally, as the foregoing paragraphs make clear, the general principles in question in this case derive from Articles 49 and 56 (less obviously from Article 18) of TFEU. If any claim based on them were not otherwise precluded, it would be precluded by the Two Freedoms Regulations (and, possibly, by the Procurement Amendment Regulations).

Tender contract

130. The claimant contends that the defendant's issue of the Invitation to Tender and the claimant's submission of a tender gave rise to a contract that included terms that the tenders submitted would be evaluated fairly, in good faith, in accordance with the tender procedure set out in the tender documentation, and that the assessment would be free from any manifest error (particulars of claim, paragraph 54). The contract alleged in the particulars of claim is pleaded in the alternative as an express or an implied contract; however, what is contended for is in reality an implied contract.

131. The leading case remains the decision of the Court of Appeal in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195. The defendant local authority had sent out invitations to tender for a concession. The form of tender stated that the defendant did not bind itself to accept all or any part of the tender and continued: "No tender which is received after the last date and time specified shall be admitted for consideration." The plaintiff club submitted a tender within the specified time, but by error the defendant failed to consider it. The Court of Appeal upheld the trial judge's decision that the defendant was liable in damages for breach of contract. The arguments advanced by Mr Toulson QC for the defendant are set out in the leading judgment, that of Bingham LJ, and were in summary: (i) that an invitation to tender is no more than a proclamation of willingness to receive offers; (ii) that a statement that late tenders would not be considered does not mean or imply that timeous offers would be considered; (iii) that no contract could be implied unless it were clearly shown that all the parties intended to make a contract; (iv) that both parties had expected that timeous offers would be considered and it was in both parties' interests that they should be considered, but it was unnecessary to suppose that they were contracting to that effect. Bingham LJ's reasoning at 1201 to 1202 is important and illuminating and I shall set out rather more of it than might be strictly consistent with best practice.

> "In defending the judge's decision Mr Shorrock for the club accepted that an invitation to tender was normally no more than an offer to receive tenders. But it could, he submitted, in certain circumstances give rise to binding contractual obligations on the part of the invitor, either from the express words of the tender or from the circumstances surrounding the sending out of the invitation to tender or, as here, from both. The circumstances relied on here were that the council approached the club and the other invitees, all of them connected with the airport; that the club had held the concession for eight years, having successfully tendered on three previous occasions; that the council as a local authority was obliged to comply with its standing orders and owed a fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs; and that there was a clear intention on the part of both parties that all timely tenders would be considered. If in these circumstances one asked of this invitation to tender the question posed by Bowen LJ in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, 266, 'How

would an ordinary person reading this document construe it?', the answer in Mr Shorrock's submission was clear: the council might or might not accept any particular tender; it might accept no tender; it might decide not to award the concession at all; it would not consider any tender received after the advertised deadline; but if it did consider any tender received before the deadline and conforming with the advertised conditions it would consider all such tenders.

I found great force in the submissions made by Mr Toulson and agree with much of what he said. Indeed, for much of the hearing I was of opinion that the judge's decision, although fully in accord with the merits as I see them, could not be sustained in principle. But I am in the end persuaded that Mr Toulson's argument proves too much. During the hearing the questions were raised: what if, in a situation such as the present, the council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded? Or if the council had considered and accepted a tender admittedly received well after the deadline? Mr Toulson answered that although by so acting the council might breach its own standing orders, and might fairly be accused of discreditable conduct, it would not be in breach of any legal obligation because at that stage there would be none to breach. This is a conclusion I cannot accept. And if it were accepted there would in my view be an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties, both tenderers (as reflected in the evidence of Mr. Bateson) and invitors (as reflected in the immediate reaction of the council when the mishap came to light).

A tendering procedure of this kind is, in many respects, heavily

weighted in favour of the invitor. … The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest. But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that

> his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course.' The law would, I think, be defective if it did not give effect to that.
>
> It is of course true that the invitation to tender does not explicitly state that the council will consider timely and conforming tenders. That is why one is concerned with implication. But the council do not either say that they do not bind themselves to do so, and in the context a reasonable invitee would understand the invitation to be saying, quite clearly, that if he submitted a timely and conforming tender it would be considered, at least if any other such tender were considered.
>
> I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill LJ in *Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A.* (No. 2) (Note) [1987] 2 Lloyd's Rep. 321, 331: 'What was the mechanism for offer and acceptance?' In all the circumstances of this case, and I say nothing about any other, I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. Since it has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way (*White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 430A, per Lord Reid), Mr Shorrock was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance."

132. Stocker LJ agreed with Bingham LJ and added some remarks at 1204:

> "Of particular significance, in my view, was the requirement that tenders be submitted in the official envelope supplied and endorsed … by the council. The purpose of this requirement must surely have been to preserve the anonymity of the tenderer and, in conjunction with the council's standing orders, to prevent any premature leak of the nature and amount of such tender to other interested or potentially interested parties. Such a requirement, as a condition of the validity of the tender submitted, seems pointless unless all tenders submitted in time and in accordance with the requirements are to be considered before any award of the concession is made. There can be no doubt that this was the intention of both parties, as exemplified

> by the council's actions when their error with regard to the time of receipt of the club's tender was appreciated. Such a common intention can, of course, exist without giving rise to any contractual obligations, but the circumstances of this case indicate to me that this is one of the fairly rare exceptions to the general rule expounded in the leading cases of *Spencer v Harding* (1870) L.R. 5 C.P. 561 and *Harris v Nickerson* (1873) L.R. 8 Q.B. 286. I therefore agree that in all the circumstances of this case there was an intention to create binding legal obligations if and when a tender was submitted in accordance with the terms of the invitation to tender, and that a binding contractual obligation arose that the club's tender would be before the officer or committee by whom the decision was to be taken for consideration before a decision was made or any tender accepted. This would not preclude or inhibit the council from deciding not to accept any tender or to award the concession, provided the decision was bona fide and honest, to any tenderer. The obligation was that the club's tender would be before the deciding body for consideration before any award was made. Accordingly, in my view, the conclusion of the judge and his reasons were correct."

Farquharson LJ agreed with both judgments.

133. I note the following points from the judgments in the *Blackpool and Fylde* case. First, contracts are not lightly to be implied. Second, a contract will not be implied unless the facts show that both parties intended to create contractual relations. Third, a claim will not succeed unless the contract that the parties intended to make was to the effect contended for by the claimant. Fourth, in the *Blackpool and Fylde* case the necessary contractual intention was shown by facts that included, in particular, the relation between the council and those invited to tender, the public obligations of the council as a fiduciary, the express prescription of a clear, orderly and familiar procedure, and the manifest intention that all timeous tenders would be considered. Fifth, the contract that was held to exist merely obliged the council to consider all timeous tenders. Sixth, the defendant council had not said anything to negative the inference that it intended to create contractual relations to the limited extent alleged by the plaintiff. Seventh, Bingham LJ expressly prescinded from expressing any view beyond the facts of the case.

134. The contract contended for by the claimant in the present case goes far beyond the contract found to exist in the *Blackpool and Fylde* case. There, the council's contractual obligation was only to consider tenders submitted in time. Such a contract would not avail the claimant in this case, because its tender was considered. Thus the claimant's case is that the defendant contractually bound itself (a) to evaluate tenders fairly, in good faith and in accordance with the procedure set out in the tender documentation and (b) to make an assessment that was free of manifest error.

135. In support of this far-reaching contract Mr Williams relied on a number of more recent authorities. In *Harmon CFEM Facades (UK) Limited v The Corporate Officer of the House of Commons* (1999) 67 Con LR 1, the plaintiff (Harmon) contended that, by issuing invitations to tender, the defendant (H of C) had made an offer to the

prospective tenderers of a contract whereby it was under the following obligations: (a) to consider each tender; (b) to do so fairly; (c) to award the contract to the tenderer that offered best value for money; (d) to comply with all of the statutory provisions pertaining to consideration of the tenders. HHJ Humphrey Lloyd QC considered the *Blackpool and Fylde* case and the subsequent decision of the Court of Appeal in *Fairclough Building Limited v Port Talbot Borough Council* (1992) 62 BLR 82, as well as several Canadian authorities. He said:

> "214. In my judgment it is clear from *Blackpool* and from the other authorities that there must be something more than a request for a tender which is to be submitted competitively along with others. An invitation to tender is by its nature not normally an offer; it solicits offers. It does not carry with it an obligation to accept any offer that is made in response to it, even if the customary disclaimer is not made. It would be quite a change if the very fact that tenderers were informed that competitive tenders being were sought was treated in law as an offer that any tenderer who submitted a tender would accept that to be treated fairly. It would intrude into the ordinary commercial freedom or discretion to accept or reject a tender or to negotiate with whoever seemed best in the eyes of the person seeking tenders. There must therefore be some good reason why obligations of the kind suggested by Harmon can arise."

The judge noted that the defendant had solicited revised tenders from the tenderers, apparently with a view to considering variations of detail, without informing the others that one tenderer had submitted an altogether different design. He continued:

> "216. … In my judgment by repeating the offer to consider alternatives … it was to be implied in that offer that by submitting a tender any alternatives would be equivalent to the schemes or schemes for which revised tenders were being sought and would be options only in terms of refinements of detail design which would reduce cost, albeit confidential to the tenderer but falling short of different proposals which were more than matters of detail but ones of changes of design, of which tenderers were not informed and therefore were entitled to assume were not matters which they needed to take into account. In my judgment even though all tenderers accepted that they would not be entitled to see alternatives of detail which were considered to be commercially confidential to a given tenderer, H of C in soliciting new or revised tenders under the European public works regime (to which effect is given by the PWR [the relevant domestic regulations]) impliedly undertook towards any tenderer which submitted a tender that its submission would be treated as an acceptance of that offer or undertaking and: (a) that the alternative submitted by any tenderer would be considered alongside a compliant revised tender from that tenderer; and (b) that any alternative would be one of detail and not design; (c) that tenderers who

> responded to that invitation would be treated equally and fairly. These contractual obligations derive from a contract to be implied from the procurement regime required by the European directives, as interpreted by the European Court, whereby the principles of fairness and equality form part of a preliminary contract of the kind that I have indicated. *Emery Construction Limited v St John's (City) Roman Catholic School Board* (1996) 28 CLR (2d) shows that such a contract may exist at common law against a statutory background which might otherwise provide the exclusive remedy. I consider that it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly: see *Blackpool* and *Fairclough* ."

136. I do not think that the *Harmon* case is of great assistance. The *Blackpool and Fylde* case expressly does not establish any general rule about the existence of contracts in procurement cases; it rested on the application of basic rules of contract to the facts of the particular case. The *Fairclough* case did not purport to go beyond the *Blackpool and Fylde* case in that regard. If (which I doubt) HHJ Humphrey Lloyd QC intended to suggest that either case was authority for the proposition that an implied contract such as was found in the *Blackpool and Fylde* case arises as a matter of law in public procurement cases—that is, that intention to create contractual relations is assumed from the mere fact of public tender—I would not agree, because that would be contrary to the reasoning in those cases. The *Fairclough* case concerned the removal of a tenderer from the select tender list on grounds of conflict of interest. The Court of Appeal accepted the correctness of the trial judge's decision that (what was effectively) a *Blackpool and Fylde* contract had arisen on the facts of the case. The judge had said that "the duty of the defendants was to act in good faith … [and] honestly to consider the tenders of those whom they had placed on the shortlist, unless there were reasonable grounds for not doing so". Parker LJ said that there was nothing in the judgment that conflicted with the *Blackpool and Fylde* case. This indicates that, when the obligation to consider arises, it can properly be glossed as an obligation to consider honestly and in good faith; so much has been confirmed in later cases, as mentioned below. That remains a limited obligation, however. The remarks of Nolan LJ in the *Fairclough* case are entirely orthodox and may be noted:

> "A tenderer is always at risk of having his tender rejected, either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer. Provided that the ground of rejection does not conflict with some binding undertaking or representation previously given by the customer to the tenderer, the latter cannot complain. It is not sufficient for him to say, however understandably, that he regards the ground of rejection as unreasonable."

137. In *JBW Group Limited v Ministry of Justice* [2012] EWCA Civ 8, 141 Con LR 62, an unsuccessful tenderer brought a claim alleging that the defendant was in breach of the Public Contracts Regulations 2006 and the terms of an implied contract that it would

consider bids fairly. The defendant contended that the regulations did not apply, and the Court of Appeal agreed. The argument for an implied contract was "that at by offering the contract out to tender, the MoJ was impliedly entering into a contract which would oblige it to treat all tenders equally and with transparency and in accordance with the terms of the tender document": see [57]. Such a contract would impose on the defendant the same substantive obligations as it would have had under the regulations. Elias LJ noted at [60] that, if the regulations had applied, an implied contract would have been unnecessary and inconsistent with the statutory scheme, and that it would be difficult to infer an intention to contract on terms akin to those in the regulations when the defendant had throughout been acting on the assumption that the regulations did not apply. He continued:

> "61. When considering the implied contract question, two issues arise for consideration: first, is there any implied contract? Second, if so, what is its scope? As to the first issue, I would be prepared to accept, in line with the well-known judgment of Bingham LJ in *Blackpool and Fylde Aero Club Ltd* v Blackpool BC [1990] 3 All ER 25, [1990] 1 WLR 1195, that the MoJ would in principle be under an obligation to consider the tender. Also, contrary to the submissions of the MoJ, I would have no difficulty in implying that any such consideration should be in good faith. Mr Vajda contended that this was an obligation under public rather than private law, but I do not see why this should preclude the obligation arising in private law also. Indeed, if a tender is not considered in good faith, I do not think that it can sensibly be said to have been considered at all.
>
> 62. However, Mr Knox does not contend that there has been a breach of this limited duty. The question is whether the implied obligations can extend beyond that limited requirement to embrace the much fuller set of duties relied upon by Mr Knox. I see no conceivable basis for concluding that it can. There is simply no basis on which it can be contended that these terms necessarily have to be implied to give efficacy to the contract; and nor can there be a common intention that they should given that the MoJ has always been denying that the regulations apply. Moreover, as Mr Vajda pointed out, the specific power conferred on the MoJ to depart from the terms of the tendering document is itself inconsistent with the EU principle of transparency which would require strict adherence to the published terms.
>
> 63. Mr Knox relied upon the fact that there are fundamental EU principles of transparency and equality, and he submitted that these would mould the nature of the implied term. However, I agree with Mr Vajda that there is no proper basis for assuming that EU principles can alter the way in which terms are implied at common law. It is common ground that these principles are not engaged as a matter of EU law, since there is no cross-

> border element in the arrangement. In effect Mr Knox is seeking to use the implied term as a means of expanding the reach of EU law and that is not, in my judgment, a legitimate exercise."

138. Mr Williams also referred in this connection to the remarks of Fraser J in *Energysolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [871]-[879] in respect of the recognition in domestic law of the principle of proportionality. However, that case involved a procurement regulated under the Public Contracts Regulations 2006, and Fraser J was not considering implied contracts.

139. The issue concerning the claim in contract comes down to the application of basic principles of contract law to a simple set of facts. In my judgment it is possible to say now that the claimant's case regarding an implied contract is wrong. The questions whether a contract was implied and, if it was, what its terms were turn on an assessment of the objective evidence. The relevant evidence is all to hand; Mr Williams has not identified any further evidence that could have a bearing on the questions, and in my view there is no likelihood that there could be any such evidence. The reasons why the claimant's claim in contract is untenable can be stated very shortly.

1) A contract of the kind recognised in the *Blackpool and Fylde* and *JBW Group* cases, namely to consider the claimant's tender in good faith, would not avail the claimant, because there is no arguable case that the defendant failed to comply with that limited obligation, if it existed.

2) A contract of the kind relied on by the claimant, including obligations to conduct the assessment in accordance with the tender procedure set out in the tender documentation and so that it was free from any manifest error goes far beyond the limited contract accepted in those cases and could only be implied upon compelling factual grounds, which are wholly lacking in this case. The reasoning of Bingham LJ in the *Blackpool and Fylde* case and that of Elias LJ in the *JBW Group* case explains this clearly enough. What the claimant is in fact seeking to do is to create a contractual basis for obligations that would have arisen under Part 2 of the 2015 Regulations.

3) Moreover, the crucial requirement of objectively demonstrated intention to undertake the contractual obligations relied on is not only absent but expressly negatived by the tender documentation. That documentation is inconsistent with any intention on the part of the defendant to enter into voluntary contractual obligations at all (thus precluding even a *Blackpool and Fylde* contract); it is certainly inconsistent with an intention on the part of the defendant to undertake the contractual obligations alleged by the claimant in paragraph 54 of the particulars of claim. The relevant parts of the ITT have been set out in paragraphs 19ff above; I refer to the following provisions: paragraph 1.6 of the prefatory Notice; section 11.3; and sections 21.2.6 (which expressly negatives contractual intent) and 21.2.7 (which is inconsistent with an obligation to carry out the assessment in accordance with published criteria).

Conclusion

140. For the reasons set out above, I consider that each of the three grounds of claim advanced by the claimant in these proceedings—the 2015 Regulations, general principles of EU law, and implied contract—has no real prospect of success.

141. I do not consider that there is any other reason requiring any of the claims to proceed to trial.

142. In his closing submissions, Mr Williams urged that, if I were to reach the conclusions that I have mentioned, I ought not to give summary judgment but rather to transfer the proceedings to the Administrative Court, where they could proceed by way of a claim for judicial review. He said that this case was not about money—any damages would at best be modest—but about the vindication of the claimant's rights and reputation and the enforcement of the obligations of the defendant as a public body. I have not been attracted to that suggested course of action. There may or may not be valid public law grounds for challenging the defendant's decision in the Procurement—I say nothing on the matter—but the case has been formulated and advanced as a private law claim; I think it would be productive of nothing but confusion to permit it to continue, even at the outset, as a claim for judicial review. If the claimant wishes to pursue remedies in public law, it is open to it to commence a claim in the Administrative Court and to contend that the matters that are presumably thought to justify transfer into that court now would equally justify an extension of time for commencing proceedings under CPR Part 54. I am not to be taken to encourage such a course.

143. Accordingly, I shall grant summary judgment on the claim in favour of the defendant.