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Case No: HT-2019-000158
HT-2019-000160
HT-2019-000173
HT-2019-000187

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

The Rolls Building, 7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31/07/2019

2019 RAIL FRANCHISING LITIGATION

Before:

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between:

STAGECOACH EAST MIDLANDS TRAINS LIMITED and others.	**Claimants**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
ABELLIO EAST MIDLANDS LIMITED	**Interested Party**

And Between:

ARRIVA RAIL EAST MIDLANDS LIMITED	**Claimant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
ABELLIO EAST MIDLANDS LIMITED	**Interested Party**

And Between:

WEST COAST TRAINS PARTNERSHIP LIMITED AND OTHERS	**Claimants**
- and -	
DEPARTMENT FOR TRANSPORT	**Defendant**
- and -	
(1) MTR WEST COAST PARTNERSHIP LIMITED	**Interested Parties**
(2) FIRST TRENITALIA WEST COAST LIMITED	

And Between:

STAGECOACH SOUTH EASTERN TRAINS LIMITED AND OTHERS	**Claimants**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and –	
(1) SOUTH EASTERN RAILWAYS LIMITED **(2) LONDON AND SOUTH EAST PASSENGER RAIL SERVICES LIMITED**	**Interested Parties**

- - - - - - - - - - - - - - - - - - - -
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MR PHILIP MOSER QC, MR JOSEPH BARRETT and MR JACK WILLIAMS (instructed by Stephenson Harwood LLP) for the Arriva Claimants
MR TIM WARD QC (instructed by Herbert Smith Freehills LLP) for the Stagecoach Claimants
MR JASON COPPEL QC and MR PATRICK HALLIDAY (instructed by Ashurst LLP) for the West Coast Claimants

MR RHODRI THOMPSON QC, MS FIONNUALA McCREDIE QC, MS ANNELI HOWARD and MS FIONA BANKS (instructed by Eversheds Sutherland (International) LLP [East Midlands], Addleshaw Goddard LLP [West Coast] and DLA Piper UK LLP [South Eastern]) for the Defendant

Hearing dates: 18th/19th July 2019

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Approved Judgment

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

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Mr Justice Stuart-Smith:

Introduction

1. The Claimants are train operating and associated companies that have brought four sets of judicial review and Part 7 proceedings arising out of the Defendant's conduct of procurement exercises for three separate rail franchises. I shall refer to the Claimants collectively as the TOCs (i.e. Train Operating Companies) and individually as Arriva, SEMTL, SSETL and WCTP. From time to time I shall refer to SEMTL and SSETL collectively as Stagecoach.

2. Only a minimalist introduction to the facts is necessary by way of introduction to the litigation. It should be emphasised that at this stage I am making no findings of fact; I merely provide the lightest of sketches to outline the circumstances that have given rise to this litigation.

3. The Defendant, acting through the Department for Transport, is responsible for running competitions for rail franchises, including those for the East Midlands, South Eastern and West Coast Franchises. The TOCs are all substantial and experienced operators. Arriva and SEMTL participated in the competition for the East Midlands Franchise; SSETL participated in the competition for the South Eastern Franchise; and WCTP participated in the competition for the West Coast Partnership Franchise. Without making any specific findings, it is clear that these competitions have been run during a period of regulatory uncertainty about the correct approach that should be taken by the trustees of the privatised Railways Pension Scheme. In the past, actuarial valuations of the scheme have been carried out assuming the highest security of covenant. In and since about 2016 the Pensions Regulator has called that assumption into question, the suggestion being that a lower level of security should be assumed. This change of assumption has the effect of increasing the level of assessed pensions liabilities. The question then arises: how should those increased liabilities be funded? The Court was told at the hearing leading to this judgment that the period of regulatory uncertainty continues because the Regulator has not reached a final conclusion on the assumptions to be made or their consequences.

4. Although the precise dates differ, the underlying structure in each case is the same in broad outline. The Defendant published the original invitation to tender ("ITT") for each competition less than 6 years but more than 3 months before proceedings were issued. In one case the original ITT provided standard form instructions and terms on pensions which did not refer to the Pensions Regulator's investigation or reflect its possible impact. The original ITT in the other cases did not require bidders to address the question of pension liabilities but provided that they would be addressed by further drafting later. The ITTs also made provision for requiring a re-bid in specified circumstances; and stated the requirement that bids should be compliant in following the instructions in the ITT and should contain no qualifications – including, specifically, any proposals for amendments which would seek to transfer risk from the franchisee to the Secretary of State. At later dates, also less than 6 years but more than three months before proceedings were issued, the Defendant issued further drafting for the ITT and re-bid instructions which required bidders to address and accept the pension risk sharing mechanism that the Defendant had developed. Each Claimant submitted bids in response to the re-bid instructions, this also happening less than 6 years but more than 3 months before proceedings were issued. On 9 April

2019, less than three months before proceedings were issued, the Defendant wrote to each of the Claimants notifying them that they had been disqualified from the competition. The central reason for disqualification was the non-compliance of their bids in relation to the issue of pensions and the allocation of risk; where there were other stated reasons, they do not affect the matters of principle that fall to be decided. It is now accepted that each of the Claimants' bids was non-compliant in relation to pensions.

5. There is a considerable but varying degree of overlap between the way in which each Claimant has pleaded its Part 7 claim and its judicial review proceedings. At an initial hearing on 20 June 2019 I directed that the judicial review proceedings should be stayed and that the Part 7 claims should act as the vehicle for the resolution of all issues. On that occasion the Defendant indicated his intention to bring applications to strike out all or parts of the claims being brought by each Claimant. It followed from my direction staying the judicial review proceedings that any strikeout application, whether directed at the public law or private law aspects of the claims, would be brought by reference to the Part 7 claims. This pragmatic solution may not be conceptually pure, but it does not prevent the determination of all necessary issues. As a guiding principle and in the light of my earlier directions, matters of form should not get in the way of matters of substance without the most compelling or binding reason.

6. The Defendant's skeleton argument provides a convenient categorisation of the complaints raised by the Part 7 claims. It summarises the targets of his strikeout application as being the following three categories:

   i) The introduction of the pension requirements as part of the rebidding process after the date of the original ITT;

   ii) The substance of the pension requirements that were introduced by the additional drafting after the issuing of the original ITT; and

   iii) The extent of the Defendant's discretion as set out in the original ITT.

7. There are essentially two limbs to the Defendant's applications, which are for orders striking out or giving summary judgment on those parts of the Claimants' claims. Although made in the context of the judicial review proceedings having been stayed, the first is directed at the Claimants' public law challenges to the Defendant's acts or decisions while the second is directed at claims for private law remedies. First, it is submitted that some of the claims that would normally fall to be brought by judicial review are out of time because they rely upon events happening more than three months before proceedings were issued. Second, it is submitted that any claims for damages (or other private law remedies) for breach of duty owed to the individual TOCs cannot be brought unless founded upon a successful public law challenge to the decisions of the Defendant, because they are otherwise time barred. This means that any claim for damages would have to be brought within the time allowed for bringing judicial review proceedings to mount a public law challenge to an act or decision of which a Claimant complains. The Defendant submits that any private law claim that seeks to "bypass" the procedural protections afforded by the procedure laid down for judicial review challenges is an abuse of process.

8. In substance therefore, the Defendant's applications rest upon the proposition that the parts of the Part 7 pleadings that they identify are time-barred. In submissions (but not in his notices of application) the Defendant has argued that the parts of the claims that he seeks to eliminate are an abuse of process. This submission is separate and discrete, but it is closely allied to the proposition that the private law pleadings are, or should be, time-barred.

The Notices of Application

9. The Defendant's Notice of Application in each case identifies the order the Defendant seeks in the same terms, namely:

> "The Defendant applies for an Order to strike out pursuant to CPR Parts 3.4(2)(a) and/or for summary judgment pursuant to CPR Part 24 in respect of those parts of the Claimants' Particulars of Claim and Claim Forms insofar as they seek to challenge, quash and/or seek declaratory/injunctive relief and/or damages in respect of:
>
> (i) the design and requirements of the franchise competition, as specified in the invitation to tender (ITT) documents;
>
> (ii) the introduction of the Pensions Requirements as part of the Revised Bid instructions and their legality; and
>
> (iii) the existence and scope of the Defendant's reserved discretion to evaluate and disqualify bids as part of the tender process for non-compliance with the above requirements, (together, the "tender process complaints")
>
> on the basis that those parts of the Claims are out of time and have not brought with the required rapidity pursuant to Regulation 1370/2007, namely within 3 months of the date when the Claimants knew, or ought to have known the grounds giving rise to their claim, within the meaning of CPR Rule 54.5 and applicable EU and UK law.
>
> In the alternative, the Claimants have no real prospect of succeeding on these issues because the Claimants knew, or could with reasonable diligence have discovered, prior to the 3 month deadline, the relevant facts to constitute the cause of action and thus necessary to commence proceedings in respect of the claim, namely that the matters of which they complain caused or risked causing them loss."

10. The Defendant set out his position on remedies in his skeleton argument for each application in identical terms as follows:

> "If the Applications are successful, there will be no basis for declaratory or other relief in respect of the ITT or the Re-Bid Instructions and/or the Pensions Requirements set out therein

> (in the case of [C] including but not limited to its non-compliances concerning the Pension Requirements). Accordingly those remedial aspects of the Claims should be struck out or summary judgment granted in the Defendant's favour in that regard. The Claimants should be directed to amend their pleadings to reflect the ongoing scope of the matters in dispute."

Basic Principles

The Test on an Application to Strike Out or for Summary Judgment

11. The Defendant's applications to strike out are brought pursuant to CPR Rule 3.4 which, so far as material, provides:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing …the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

12. The application for summary judgment is brought pursuant to CPR Rule 24.2 which, so far as material provides:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) …; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

13. The principles that are applicable to an application for summary judgment under CPR Rule 24.2(a) are similar to those that apply to an application to strike out under CPR Rule 3.4(a). They are conveniently summarised by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I bear them in mind throughout; but it is not necessary to set them out again here. For present purposes it is sufficient to note that "no real prospect of succeeding" means that the Court must

consider whether the claimant has a realistic as opposed to a fanciful prospect of success; however, in reaching that conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

14. As convenient shorthand I will refer to the Defendant's applications to strikeout and for summary judgment collectively as applications to strikeout.

Private and Public Law and the Claimants' Claims

15. Where the actions of a public body are challenged (by which I mean in this judgment that the claimant asserts that the actions should be set aside or varied or that the public body should be compelled to act in a particular way) there is a clear and strong public interest in the challenge being brought and disposed of quickly. One question raised by the Defendant's applications in this litigation is whether that public interest applies to the same extent in relation to private law claims.

16. The "divorce" of public and private law and the problems caused by rigorous insistence upon the use of particular forms of action are chronicled in *Wade and Forsyth, Administrative Law 11th Edn.* at 568-583. Without attempting to paraphrase or summarise the overall position, it may reasonably be said that the quintessential public law challenge is a claim to set aside or vary the decision or act of a public body, which statute and the rules of court require to be by judicial review. Thus control of administrative action is to be exercised by judicial review, which is the forum for the exercise of the prerogative remedies now known as mandatory, prohibiting and quashing orders. The quintessential private law claim is a claim for damages where it is alleged that the decision or act of the public body has infringed a claimant's private law rights and caused the claimant to suffer loss or damage. Such a claim does not require or imply that the administrative action in question should be "invalidated" in the sense of being set aside or varied even though "from the defendant's perspective, Professor Honoré identified the function of tort law as being to "forbid or discourage" particular forms of conduct or "at a minimum, to warn those who indulge in it of the liability they may incur": see *Clerk & Lindsell on Torts 21st Edn.* at 1-14ff. "Cross-over" remedies are injunctions and declarations, both of which may be available as private law remedies but which may have characteristics in common with the prerogative remedies.

17. The incorporation of EU law has led to the incorporation into English law of principles and duties such as those of transparency, equal treatment, fair process and proportionality upon which the Claimants rely as the basis of both their Part 7 proceedings and their judicial review proceedings. Where a claimant alleges breaches of such duties, there is nothing intrinsically surprising about the bringing of both a public law challenge to the validity of an act or omission by a public authority claiming one or more of the public law remedies that are available and also a private law claim for one or more of the remedies that are available in private law. It is established beyond argument that the same set of facts and matters may found both a public law challenge and a private law claim for remedies; and that a liability for damages arising from breach of duties derived from EU law should be regarded as liability for breach of statutory duty but subject to *Francovich* conditions: see *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [1998] 1 CMLR 1353 at [173]-[174], *Phonographic Performance Ltd v Department of Trade and Industry*

[2004] 1 WLR 2893 at [12]-[13], *R (Chandler) v Secretary of State for Children Schools and Families* [2009] EWCA Civ 1011 at [76]-[78], *Energy Solutions v Nuclear Decommissioning Authority* [2017] 1 WLR 1373 at [37]-[39], *Amey Highways Ltd v West Sussex County Council* [2019] EWHC at [10]-[11].

18. In the present litigation each Claimant claims in both its judicial review and its Part 7 claims that the Defendant owed them duties derived from EU law. Thus:

i) [67]-[70] of SEMTL's Particulars of Claim in the Part 7 proceedings pleads as follows:

> "67. In his conduct of the Procurement, the Secretary of State was required to comply with the terms of the Railway Regulation (which was expressly referred to as the basis for the Procurement). The Railway Regulation gives rise to directly effective rights and is a concrete expression of obligations flowing from EU Treaty principles, in particular those of equal treatment, transparency, non-discrimination, proportionality, good administration, non-arbitrariness, protection of legitimate expectations and the requirement to act without manifest error (the **"EU Treaty principles"**). The Secretary of State was required expressly (but without limitation) to comply with:
>
> a. Article 3, concerning public service contracts and general rules.
>
> b. Article 4, concerning the mandatory content of public service contracts and general rules.
>
> c. Article 5, concerning the award of public service contracts which requires that the procedure adopted *"shall be fair and observe the principles of transparency and non-discrimination"*. (emphasis original)
>
> d. Article 6, concerning public service compensation.
>
> e. Article 9, concerning compatibility with the Treaty.
>
> 68. Further or alternatively, the Secretary of State was required to comply with those same obligations flowing from the EU Treaty principles as they arise out of the EU Treaties themselves and which give rise to directly effective EU law rights and the general principles of EU law.
>
> 69. Further or alternatively, the Secretary of State was required to comply with obligations arising under Articles 49 and/or Article 56 of the Treaty on the Functioning of the European Union (**"TFEU"**) on freedom of establishment and the freedom to provide services.

> 70. The Secretary of State's breaches of the terms of the Railway Regulation and/or Articles 49 and/or Article 56 TFEU and/or obligations flowing from EU Treaty principle which give rise to directly effective EU law rights constitute breaches of the terms of section 2(1) European Communities Act 1972 *and are actionable in domestic law by way of a claim for breach of statutory duty*." (emphasis added)

The same passage is pleaded as [71]-[74] of SEMTL's Statement of Facts and Grounds in its judicial review proceedings save that the words I have italicised at the end of [74] of the Particulars of Claim are replaced by " … and are actionable by judicial review". One further paragraph is added at [75] of the Statement of Facts and Grounds which alleges that the Defendant "was required to comply with the public law obligations imposed by common law … ", which are also pleaded to be actionable by way of judicial review. In this way SEMTL draws the distinction between the effect of the pleaded duties in private and public law respectively;

ii) SSETL adopts the same approach and wording as SEMTL at [69]-[72] of its Part 7 Particulars of Claim and [75]-[79] of its Statement of Facts and Grounds in its judicial review proceedings;

iii) [91]-[92] of WCTP's Particulars of Claim in its Part 7 proceedings pleads as follows:

> "91. In its conduct of the Procurement, the Defendant is required to comply with:
>
> (i) the provisions of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road (**"the Railway Regulation"**), including:
>
> (a) Article 4(1), by which the Franchise Agreement must clearly define the franchisee's public service obligations and must establish in advance, in an objective and transparent manner (*inter alia*), the nature and extent of any exclusive rights granted, the arrangements for the allocation of costs connected with the provision of services and the parameters on the basis of which the franchisee's compensation is to be calculated;
>
> (b) Article 5(3), by which the procedure for competitive tendering of the Franchise Agreement must be fair and must observe the principles of transparency and non-discrimination, as well as (by implication) the principle of equal treatment, and (by implication) by which assessment of bids must be free from manifest error;

> (ii) Articles 49 and/or 56 of the Treaty on the Functioning of the European Union ("**TFEU"**), on, respectively, freedom of establishment and the freedom to provide services;
>
> (iii) general principles under the TFEU, including the principles of non-discrimination, proportionality, transparency, equal treatment, the protection of legitimate expectations, the requirement to act without manifest error and good administration.
>
> 92. Any breach by the Defendant of the obligations referred to in paragraph 91 above constitutes a breach of section 2(1) of the European Communities Act 1972 and is actionable in domestic law by way of a claim for breach of statutory duty. …"

At [9] of the Statement of Facts and Grounds in its judicial review proceedings, WCTP replicates [91] of its Particulars of Claim (as set out above) with the addition at [9(iv)] of an additional obligation "s. 26 RA, as supplemented by his domestic public law duties." [10] of the Statement of Facts and Grounds then draws the distinction between WCPT's private law and public law proceedings by stating:

> "Without prejudice to its contention that breaches of the duties described in sub-paragraphs 9(i), 9(ii) and 9(iii) above are actionable by way of private law claims for breach of statutory duty under section 2(1) of the European Communities Act 1972, the Claimant avers that the Defendant's breaches of such duties are also amenable to judicial review."

iv) [96]-[101] of Arriva's Particulars of Claim in the Part 7 proceedings pleads as follows:

> "96. In his design and conduct of the Procurement, the Defendant owed the Claimant a duty to comply with the following (collectively, "**the Defendant's obligations**"):
>
> a. the Regulation and/or;
>
> b. enforceable general principles of EU law arising the EU Treaties and/or the ECA72, including (without limitation) those of equal treatment, transparency, non-discrimination, non-arbitrariness, proportionality, good administration, procedural fairness, and the protection of legitimate expectations; and/or
>
> c. Ars. 49 and 56 of the Treaty on the Functioning of the European Union (the "**TFEU**"); and/or
>
> d. the Railways Act 1993 as amended by the Railways Act 2005 (together "**the Acts**"); and/or
>
> e. the Implied Tender Contract; and/or

f. enforceable general public law duties owed as a public authority, namely to take decisions in a procedurally proper fashion that are lawful, reasonable, proportionate, procedurally fair, substantively fair and respect legitimate expectations.

97. The Defendant was further required to conduct a process for the selection of tenderers and award of the Contract that was free from manifest error and/or irrationality.

98. In particular, the Defendant was required to treat the Claimant equally, transparently and in a proportionate way. It was required to conduct the Procurement in accordance with the procedure set out in the ITT and other tender documents, and to assess each bid solely by reference to the award criteria and scoring criteria set out therein. The Defendant was further required to conduct a fair and objective assessment of the tender responses to the Procurement that was free of manifest error.

99. Further or alternatively, by their respective conduct relating to the Procurement, the Claimant and the Defendant established an implied tender contract that comprised express and/or implied terms that the Defendant would conduct the Procurement in accordance with the aforementioned general EU Treaty principles ("**the Implied Tender Contract**").

A. The Regulation

100. Without prejudice to the generality of the obligations identified above, insofar as the Regulation is concerned, the Defendant (as a competent authority and/or public service operator, as defined in the Regulation) owed the Claimant (as a public service operator, as defined in the Regulation) a duty to comply (without limitation) with the following Articles:

a. **Article 2a(1)**: "*When laying down those specifications and the scope of their application, the competent authority shall duly respect the principle of proportionality, in accordance with Union law"* and *"The specifications shall be consistent with the policy objectives stated in public transport policy documents in the Member States*"; and/or

b. **Article 2a(2):** "*The specifications of the public service obligations and the related compensation of the net financial effect of public service obligations shall: (a) achieve the objectives of the public transport policy in a cost-effective manner; and (b) financially sustain the provision of public passenger transport, in accordance with the requirements laid down in the public transport policy in the long term*"; and/or

c. **Article 4(1)**: *"Public service contracts and general rules shall: (a) clearly set out the public service obligations, defined in this Regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned; [and] (b) establish in advance, in an objective and transparent manner: (i) the parameters on the basis of which the compensation payment, if any, is to be calculated; and (ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation*"; and/or

d. **Article 5**: *"(1) Public service contracts shall be awarded in accordance with the rules laid down in this Regulation*" and/or *"(3)The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination*" and/or *"(7) Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law*"; and/or

e. **Article 6(1):** "*All compensation connected with a general rule or a public service contract shall comply with the provisions laid down in Article 4, irrespective of how the contract was awarded*".

B. The Acts

101. Without prejudice to the generality of the obligations identified above, insofar as the Acts are concerned, the Defendant owed the Claimant a duty to comply (without limitation) with the following Sections:

a. **Section 4(1):** The Defendant has a duty to exercise his functions in the manner with which are "*best calculated*": "*(c) to promote efficiency and economy on the part of persons providing railway services*"; and/or "(*d) to promote competition in the provision of railway services for the benefit of users of railway services";* and/or *"(g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance*"; and/or

b. **Section 4(2):** The Defendant has a duty to exercise functions in the manner which are "*best calculated to protect*": *"(b) the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector*

> *operator, in respect of—(i) the prices charged for such use; and (ii) the quality of the service provided*"; and/or
>
> c. **Section 26(3):** *"The appropriate franchising authority shall not issue an invitation to tender under this section to (or entertain such a tender from) any person unless it is of the opinion that the person has, or is likely by the commencement of the franchise term to have, an appropriate financial position and managerial competence, and is otherwise a suitable person, to be the franchisee.""*

v) Arriva incorporated its Particulars of Claim in the Part 7 proceedings into its Statement of Facts and Grounds, alleging at [9] that "the Claimant's substantive grounds of challenge – as detailed in the PoC – fall to be determined in one or other sets of proceedings. The PoC is, accordingly, adopted and should be treated as incorporated by reference into this statement of facts and grounds."

19. The fact that the Claimants have issued both Part 7 proceedings and judicial review proceedings reflects the fact that the conduct of the franchise competitions engages both public and private law rights and obligations. It would be wrong to view this area of law through a purely public law prism or a purely private law prism. Public and private law coexist as elements of English law and there is no a priori reason of principle that demands primacy for one or the other. It is beyond the scope of this judgment to try to set out the history of the development of either; but that history demonstrates the flexibility of the common law and its ability to recognise rights and fashion remedies to meet particular situations. It also shows the willingness of Parliament to set the bounds of the law which the judges are to interpret and apply where and when it considers it appropriate to do so.

20. With one exception, the difference between the Part 7 claims and the judicial review proceedings emerges clearly in the remedies claimed in each set of proceedings. Thus:

i) WCTP in its Part 7 Particulars of Claim alleges financial loss and damage and claims at [121]:

> "(i) a declaration that the Defendant has acted unlawfully in: (a) its design of the Procurement in the ways described in paragraphs 94 to 106 above; and/or (b) in allowing MTR to continue to participate in the Procurement despite adding RENFE as a key subcontractor; and/or (c) in taking the Disqualification Decision; and/or (d) in its treatment of MTR's and FTWC's bids;
>
> (ii) an injunction requiring the Defendant: (a) to desist from conducting the Procurement on the basis of a Procurement design which is unlawful, as described in paragraphs 94 to 106 above; and/or (b) to exclude MTR from the Procurement; and/or (c) to restart the Procurement on a lawful basis; and/or (d) to revoke the Disqualification Decision;

(iii) damages for the losses described in paragraph 120 above, and in this regard the Claimants aver that the breaches particularised above are sufficiently serious to warrant an award of damages;

(iv) interest;

(v) such further relief as may be just and appropriate; and/or

(vi) costs."

By its judicial review Claim Form WCTP seeks (i) a declaration that the disqualification decision was unlawful; (ii) an order quashing the disqualification decision; (iii) such other relief as is necessary to give effect to the Court's judgment; and (iv) costs. These heads of relief are replicated at [27] of WCTP's Statement of Facts and Grounds. Subject to the "cross-over" claims for declaratory relief and an injunction in the Particulars of Claim (to which I will return) WCTP has therefore confined itself to private law remedies in the Particulars of Claim and a typical public law remedy in its judicial review proceedings.

ii) SEMTL and SSETL claim identical relief in their respective Particulars of Claim. After alleging that the Defendant's breaches of duty have caused them to suffer loss and damage (and/or that they risk suffering loss or damage) they claim (with adjustments depending upon the franchise being addressed included in square brackets below):

"1. A declaration or declarations that the Secretary of State acted unlawfully and in breach of statutory duty in (a) disqualifying [SEMTL/SSETL] from the [EM/SE] Franchise Competition [and (b) awarding the EM Rail Franchise to Abellio and/or not awarding the EM Rail Franchise to SEMTL];

2. An injunction requiring the Secretary of State to revoke the Disqualification Decision and/or restart the Procurement on a lawful basis;

3. Damages for loss of profit and/or contribution to overheads and/or wasted tender costs;

4. Damages for loss of reputation, goodwill and the ability to win and earn profits on other similar contracts;

[5. Damages for the loss of the chance of being awarded the EM Rail Franchise;]

6. Interest pursuant to section 35A of the Senior Courts Act 1981 or the equitable jurisdiction of the Court on the amount found to be due to the Claimant at such rate and for such period as the Court sees fit; and/or

7. Such further or other relief as the Court may determine.

8. Costs."

The remedies sought by the SEMTL and SSETL judicial review Claim Forms and Statements of Facts and Grounds are essentially identical. The Statements of Facts and Grounds conclude (again with suitable adjustments):

> "By way of remedy, the Claimants seek a declaration or declarations that the Secretary of State acted unlawfully in (a) disqualifying [SEMTL/SSETL] from the [EM/SE] Rail Franchise Competition [and (b) awarding the EM Rail Franchise to Abellio and/or not awarding the EM Rail Franchise to SEMTL, and that accordingly the contract awarded to Abellio is void.]
>
> Further or alternatively, the Claimants seek an order quashing the Disqualification Decision [and the Award Decision].
>
> [An order remitting the Disqualification Decision and Award Decision for re-consideration.]
>
> The Claimants further seek damages by means of the Part 7 proceedings."

iii) Following an allegation that the Defendant's breaches of duty have caused them to suffer or risk suffering loss and damage, the prayer in Arriva's Part 7 Particulars of Claim is for:

> "(1) A declaration that the Procurement undertaken by the Defendant and/or the Award Notification breached the ECA72; and/or the Regulation; and/or the general principles of EU law; and/or Articles 49 and/or 56 TFEU; and/or the Acts; and/or the Implied Tender Contract and/or the Defendant's general public law duties; and/or involved manifest error(s), and are thereby unlawful;
>
> (2) An order that the Procurement and/or the Award Notification be set aside pursuant to the Defendant's obligations and/or for breach of the Implied Contract and/or quashed for unlawfulness;
>
> (3) An order that the Franchise Agreement be awarded to the Claimant (and/or a declaration that the Defendant, if it had acted lawfully, would have determined that the Claimant should be awarded the Franchise Agreement), or alternatively an order that the Procurement be re-run in full accordance with the Defendant's obligations;
>
> (4) An order that the Franchise Agreement be quashed.

> (5) Further or alternatively damages in an amount to be assessed (for, *inter alia*, loss of profit and/or contribution to overheads and/or wasted tender costs and/or loss of reputation, goodwill and/or the ability to win and/or earn profits on other similar contracts), the aforesaid breaches being sufficiently serious breaches of obligations to give rise to a compensation (if, which is denied, it is relevant to the Claimant's case as pleaded);
>
> (6) Interest pursuant to section 35A of the Senior Courts Act 1981 or the equitable jurisdiction of the Court on the amount found due to the Claimant at such a rate and for such period as the Court shall think fit;
>
> (7) Such further or other relief as may be just and appropriate; and
>
> (8) Costs."

iv) In Arriva's case the relief sought by the judicial review Claim Form and Statement of Facts and Grounds is materially identical to the relief sought by the Part 7 Particulars of Claim. However, a fair reading of the Arriva pleadings suggests that this is a consequence of having incorporated the Particulars of Claim into the Statement of Facts and Grounds and, perhaps, a less rigorous attention to the distinction between public and private law remedies when it came to the prayer in each case. Viewed overall, it is evident (and Arriva asserts) that the general thrust of Arriva's Part 7 proceedings is the breach of private law rights and obligations and that the thrust of their judicial review proceedings is the breach of public law rights and obligations; and that, as Mr Moser QC put it, when they came to remedies, they put the kitchen sink in both sets of proceedings. At worst, this may lead to temporary confusion at this stage because Arriva has expressly sought public law remedies in its Part 7 proceedings and private law remedies in its judicial review proceedings. Once again, I am more concerned with substance than form in the absence of compelling or binding reasons to the contrary.

The Limitation Act 1980

21. Limitation as such under English law is primarily a matter for the legislature. The circumstances in which limitation periods may be applied by analogy are limited and closely circumscribed by the principles of legal certainty: see *FMX Food Merchants Co Ltd v Revenue and Customs Comrs* [2019] 1 WLR 2841 at [42], [47] and [67]-[71]. The common law has other means of protecting parties and the Court itself against unacceptable delay, such as the doctrines of laches or abuse of process, which will in extreme cases empower the Court of its own inherent jurisdiction to strike out offending claims or proceedings.

22. The Limitation Act 1980 is the primary statute that establishes limitation periods in English law. The limitation period for an action founded on tort or simple contract is six years: see ss. 2 and 5. It is open to the legislature to enact different time limits for

particular categories of case, and it has done so for judicial review proceedings and some categories of procurement proceedings as I set out below.

The Jurisdiction of the Administrative Court and judicial review

23. The jurisdiction of what is now the Administrative Court is founded on ss. 29-31 of the Senior Courts Act 1981 which, so far as material, provide:

> "29.— **Mandatory, prohibiting and quashing orders.**
>
> (1) The orders of mandamus, prohibition and certiorari shall be known instead as mandatory, prohibiting and quashing orders respectively.
>
> (1A) The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1st May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively.
>
> …
>
> 30.— **Injunctions to restrain persons from acting in offices in which they are not entitled to act.**
>
> (1) Where a person not entitled to do so acts in an office to which this section applies, the High Court may—
>
> (a) grant an injunction restraining him from so acting; and
>
> (b) if the case so requires, declare the office to be vacant.
>
> (2) This section applies to any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter.
>
> 31.— **Application for judicial review.**
>
> (1) An application to the High Court for one or more of the following forms of relief, namely—
>
> (a) a mandatory, prohibiting or quashing order;
>
> (b) a declaration or injunction under subsection (2); or
>
> (c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders ;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

…

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

…

(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if–

(a) the application includes a claim for such an award arising from any matter to which the application relates; and

(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.

(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition–

(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or

(b) substitute its own decision for the decision in question.

…

> (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.
>
> …"

24. At the risk of restating the obvious, it is to be noted that:

i) S. 31 does not impose any limitation period for judicial review, though it could have done. The limitation period for judicial review is established by rules of Court: see below;

ii) Despite the absence of a statutory limitation period in s. 31, where there has been "undue delay" in bringing an application, s. 31(6) gives the Court power to refuse leave or, as appropriate, to refuse relief on specified grounds which include that the giving of relief would be detrimental to good administration;

iii) S. 31(2) enables the court to make a declaration or grant an injunction in judicial review proceedings if an applicant asks for that relief and the court considers it to be convenient to make such an order on specified grounds. It is therefore contemplated by the section that the applicant may be prevented from bringing a claim for a declaration or an injunction as part of its judicial review proceedings on the grounds of procedural convenience. This does not mean or imply that the claim for a declaration or injunction would be invalid if brought by action rather than by the judicial review proceedings, though this needs further consideration below;

iv) S. 31(4) contemplates that a claim for damages (or restitution or recovery of a sum due) may be brought by action separately from the judicial review proceedings: that possibility is made a prerequisite to the making of an award of damages (or restitution or recovery of the sum due) in the judicial review proceedings themselves. There could be no basis for making such an award of damages in the judicial review proceedings unless the right to such an award in an action would arise from facts and matters that were also in play in the judicial review proceedings. Thus s. 31(4) expressly contemplates the bringing of an action and concurrent judicial review proceedings arising out of the same facts and matters.

25. The relevant rules of Court are provided by CPR Part 54. They reflect and amplify the provisions of s. 31 of the Act as follows:

    i) The judicial review procedure *must* be used in a claim for judicial review where the claimant is seeking a mandatory order, a prohibiting order, a quashing order, or an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act): CPR 54.2. This relates back to s. 31(1);

    ii) The judicial review procedure *may* be used in a claim for judicial review where the claimant is seeking a declaration or an injunction: CPR 54.3(1). This relates back to the power granted by s. 31(2);

    iii) A claim for judicial review *may* include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone: CPR 54.3(2). This relates back to the power granted by s. 31(4);

    iv) The claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose; and these time limits in the rule may not be extended by agreement between the parties: CPR 54.5(1) and (2);

    v) CPR 54.5 provides exceptions to the general time limit imposed by CPR 54.5(1) in cases involving planning decisions or the Public Contracts Regulations 2015 ("PCR") or where another enactment provides for a shorter period for bringing judicial review proceedings.

26. Apart from the limitation provisions set out in CPR 54.5, the provisions of CPR 54 that are of most interest for present purposes are the provisions enabling claims for damages, declaratory relief or an injunction to be brought by judicial review proceedings in certain circumstances. These provisions, which reflect s. 31(2) and s. 31(4) are of interest because those forms of relief are or may typically be forms of relief that are available under private law. Taken together, s. 31 and CPR 54 may be seen as a code which is designed to ensure that challenges to public acts or omissions that seek prerogative remedies are brought swiftly and are subject to a relatively swift procedure in order to strike the balance between the needs of administrative efficiency and the requirement that well founded public law challenges may be brought effectively. They also make provision for procedural convenience by permitting private law remedies to be sought when using the judicial review procedure. When that is done, the proceedings must still be brought within the normal time limits for judicial review.

Specific Provision for Procurement Law

27. There has been legislative intervention in the field of procurement law in fields which do not include the present claims:

    i) The PCR do not apply to public service contracts for public passenger transport services by rail and therefore do not apply in the present case: see PCR Regulation 10(1)(i). Where they do apply, the duties owed to economic operators are set out at regulations 89 and 90; and a breach of duties in

accordance with those regulations is actionable by any economic operator which, in consequence of the breach, suffers or risks suffering, loss or damage: see PCR Regulation 91. The PCR provides special time limits for bringing claims by Regulations 92 and 93. The time limits differ, depending upon whether the claimant seeks a declaration of ineffectiveness. The general time limit for bringing a claim where the proceedings do not seek a declaration of ineffectiveness is (subject to qualifications) 30 days beginning with the date when the economic operator first new or ought to have known that the grounds for starting the proceedings had arisen: see Regulation 92. Where a declaration of ineffectiveness is sought, the time limit is 30 days beginning with the relevant date (as defined) with a longstop 6 months beginning with the date on which the contract was entered into: see Regulation 93;

ii) The Utilities Contracts Regulations 2016 ("UCR") also do not apply to service contracts for public passenger transport services by rail and therefore do not apply in the present case: see Regulation 21(1)(g). Where they do apply, the duties owed to economic operators are set out at Regulations 104 and 105. Regulation 106 provides that a breach of the duty owed in accordance with Regulation 104 or 105 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage. As with the PCR, the UCR provides separate time limits depending upon whether the proceedings seek a declaration of ineffectiveness. Once again, the headline time limit where no declaration of ineffectiveness is sought is 30 days starting with the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen; and where a declaration of ineffectiveness is sought, the time limit is 30 days beginning with the relevant date (as defined) with a longstop 6 months beginning with the date on which the contract was entered into: see Regulations 107 and 108.

28. Two features may be noted. First, breach of the duties owed under the regulations are actionable on proof of risk of loss, which differs from the normal rules for actions in tort and is not a necessary prerequisite for bringing judicial review proceedings. Second, the time limits are a carefully calibrated set of specific periods which differ from those that apply to the bringing of judicial review proceedings or to actions founded on tort or simple contract.

29. Regulation 1370/2007, commonly referred to as the Railway Regulation, has been in force (subject to immaterial amendments) since 3 December 2007. In contrast to the decision to enact the PCR and the UCR, the United Kingdom has not implemented it by domestic regulations, though it could have done so. There may be an issue at trial about whether it is operative to create legal obligations upon the Defendant as a result of Article 8.2. Its terms are wide enough to include the current franchise competitions and, in any event, the ITT in each case said that the competition would be conducted "in accordance with" the terms of the Railway Regulation. This raises an interesting question whether a breach of duties articulated by the Railway Regulation would technically be a breach of contract or of statutory duty. Fortunately it is not necessary to decide that question now because it is common ground that the Court should proceed at present on the basis that the relevant duties were owed (whether contractually or as direct statutory duties) and the difference does not affect the principles that are in issue in this strikeout application.

30. The most relevant articles of the Railway Regulation are:

> "5.3 Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5, and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.
>
> …
>
> 5.7 Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraph 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law.
>
> …
>
> 8.2 … [T]he award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity."

31. It may be noted that the Railway Regulation by Article 5.7 does not lay down any particular time limits and leaves it to the Member State to take the necessary measures to ensure that decisions may be reviewed effectively or rapidly. It is therefore impossible to derive a specific time limit from the Railway Regulation in order to support an argument that the Court should impose that time limit as a quasi-statutory limitation period. And, whether or not the requirement of effective "review" is meant to include both public law challenges and private law claims, the Regulation does not state that the time limits for both types of action should be the same.

32. Thus, not only has the legislature decided not to implement the Railway Regulation; it has also taken the conscious decision to exclude railway franchise procurements from the PCR and UCR which would otherwise apply to them.

Uniplex and SITA

33. In case C-406/08 *Uniplex (UK) Ltd v NHS Business Authority* [2010] PTSR 1377 the Court of Justice ruled that, where a challenge is based on EU law, the principle of effective protection requires that the limitation period be sufficiently precise, clear and foreseeable and should start from the time when the claimant knew, or ought to

have known, of the alleged breach of EU law. The English Courts have subsequently applied that ruling and, in particular, have applied it to the requirement of "promptness" in regulation 32(4) in the Public Services Contracts Regulations 1993: see *SITA (UK) Ltd v Greater Manchester Waste Disposal* [2012] PTSR 645.

Accrual of Completed Cause of Action

34. I have noted that the PCR and UCR provide for breaches of duty owed under those regulations to be actionable by an economic operator on proof of risk of loss and that this does not reflect the normal position under English law for actions founded on breach of statutory duty or other torts alleging breach of duty as a source of private law rights. There was some debate during the hearing about when a breach of the duties alleged to be owed in the present case resulted in a completed cause of action. At the outset it was Stagecoach's position that claims would become actionable on breach. As the hearing progressed, Stagecoach's position became rather more fluid and the other parties tended to avoid committing themselves. In my judgment this was wise since it makes no difference to the outcome of the present strikeout applications but could conceivably become relevant at a later date.

35. The one point that requires mention is that the Defendant submitted as part of his policy-based arguments in favour of the imposition of a 3 month time limit that it would be unacceptable if private law claims only became actionable on proof of damage because it raised the prospect that a claimant could come forward in 25 years' time on the basis that it had only just suffered damage. In the context of a competition for franchises that are due to commence in the near future and to expire long before 25 years hence, that prospect seems fanciful. Without having heard full argument on the point, the last date on which a disappointed bidder might suffer damage for the purposes of the law of tort (including breaches of statutory duty) would seem to be the date on which it may be shown that it would have obtained the franchise or, if appropriate, lost the chance of obtaining the franchise. Even if it were to be assumed that the private law causes of action alleged in the present case (or generally in such cases) accrue on proof of damage, I do not consider that the likely timescales make any material or determinative difference to the issues of principle that I have to decide.

Summary

36. Pausing at this stage, I summarise the position as follows:

    i) When dealing with duties such as are alleged in the present litigation, the same facts and matters that are alleged to constitute breach of duty may give rise to both public law challenges and private law claims;

    ii) There is no legislative requirement that private law claims be brought by judicial review proceedings, though judicial review proceedings may in some circumstances be used as the vehicle for claiming private law remedies such as damages, declaratory relief and injunctions as well as public law remedies;

    iii) By ss. 2 and 5 of the Limitation Act 1980 the limitation period for an action founded on tort or on simple contract is six years;

iv) By CPR Rule 54.5, an application for judicial review must be brought promptly and in any event within three months;

v) There has been legislative intervention to impose specific time limits for claims arising under the PCR and the UCR. Despite the longstanding existence of Regulation 1370/2007, it has not been implemented by regulations or otherwise in the United Kingdom and there is no specified legislative time limit for bringing private law claims to which Regulation 1370/2007 might apply;

vi) The principle of effective protection requires the Court to operate domestic law provisions such as those considered in *Uniplex* in a way that allows a claim based on EU law grounds of challenge to be brought by reference to the date when the claimant knew or ought to have known of the alleged breach of EU law.

The Defendant's Submissions

37. The targets of the Defendant's strikeout applications and submissions, as summarised above, all came into existence more than three months before the issuing of either the judicial review or the Part 7 proceedings.

38. The Defendant's submission in relation to the targeted public law claims is simple: it submits that the facts giving rise to the claims arose and were known to have arisen more than three months before the issue of proceedings. The public law claims are claims that are required to be brought by judicial review. They are therefore time-barred by virtue of CPR 54.5.

39. The Defendant's submission in relation to the targeted private law claims is less straightforward. "The Defendant's case is that, by reason of the requirement for rapid and effective review in Regulation 1370/2007 (or as a wider aspect of the requirements of effective relief and legal certainty as a matter of EU law) read in conjunction with CPR Part 54.5, the complaints forming part of the Claims relating to [the targeted allegations] are time barred. For the same reason, the Part 7 claims are an abuse of process insofar as they seek to bypass the procedural protections afforded by the procedural protections of CPR 54."

40. The first step in the Defendant's submission is that there is an interest in legal certainty and finality. I agree, without hesitation or elaboration. The next step is that this interest means that, "in a tender context, proceedings must be instituted rapidly and without delay". In support of this submission, the Defendant points to the 30 day time-limit imposed by the PCR for commencing proceedings that are within the scope of those Regulations; and he relies upon citations from *Palmisani*¸ *Matra* and *Trim* to which I refer below.

41. The Defendant further submits that Member States are entitled to impose reasonable limitation periods in order to require those affected to challenge decisions promptly. Again, I accept that submission. However the Defendant goes on to recognise that the applicable regulation in the present case would be the Railway Regulation, which is still in a period of transition and does not include any specific limitation period; and that the United Kingdom government, while it has legislated to impose specific

limitation periods for claims falling within the PCR and the UCR, has not chosen to legislate to provide any specific limitation period for challenges or claims that would fall within the terms of the Railway Regulation. Accordingly the Defendant concedes that there is no explicit provision applying a 30 day (or any) statutory time limit or specifying any alternative time limit applicable to claims such as the present. That concession is correctly made.

42. Despite the concession that there is no separate or specific legislative time limit applicable to claims such as the present, the Defendant goes on to submit that "it is apparent from the case law that there could be no objection under EU law (including the principles of equivalence and effectiveness) to the application of a 30 day limit if the time limit set out in the [PCR] were extended to the present case. There is no conceivable argument of policy that might suggest that a more leisurely approach to challenges to public procurement in the UK rail sector is appropriate as against the generality of such challenges. However, the Defendant is content to accept that, in the absence of a specific statutory time limit, and for the purposes of these Applications, the three month judicial review time limit in CPR Part 54.4 is an appropriate domestic time limit that is capable of being applied to public decisions adopted in respect of rail franchising competitions."

43. It is not clear whether the Defendant's use of the word "challenges" in this context is a reference to (a) public law challenges that are required to be brought by judicial review, or (b) a wider scope of public law challenges that seek to set aside, vary or modify the Defendant's acts or omissions, or (c) both public law challenges and private law claims.

44. Relying upon further citation from authority to which I refer below, the Defendant submits, in terms that appear to be intended to cover both public law and private law claims, that "the time limit for breach of statutory duty is not an equivalent comparator for the right conferred by EU law in the context of a procurement case, where the right to bring a claim arises on *knowledge of the risk of loss*, not only in respect of *actual* loss, and where the UK legislator has consistently applied a much shorter limitation period to reflect the particular character of the EU claim." He submits that in such circumstances, including the present, "the standard judicial review time limits, as applied by Mann J and the Court of Appeal in *SITA*, reflect a fair balancing exercise independently of any specific statutory rule." The Defendant relies upon dicta from [38] of *Jobsin* as reflecting "the particular character of public procurement challenges, that they relate to competitive bidding processes where there is a specific and powerful imperative that legal issues should be identified and resolved as fast as possible, and where there is a particularly acute risk of prejudice to sound administration and the rights of third parties arising out of delay." Given that particular character, the Defendant submits that "this is not an area of the law where a "wait and see" attitude can be adopted – bidders are put strictly to their election either to challenge the terms of a bidding process or to participate in the competition on its terms and thereby to give up the right to challenge those terms if they are unsuccessful." Although unclear from the terms of this passage, I understand that it is meant to refer not merely to public law challenges to the validity of the terms of the competition but also to any private law claims arising out of alleged breaches of duties that are acknowledged to be enforceable by claims for damages or other private law remedies.

45. The submission based upon abuse of process is that "the claims represent an abuse of process in so far as the Claimants seek to bypass the procedural protections afforded to the Defendant in the exercise of his public law powers by pursuing a Part 7 claim rather than an application for judicial review."

46. In its final iteration, it appears to be the Defendant's case that the relevant time period for bringing either a public law challenge or a private law claim in the circumstances of this litigation is "three months from the date on which the claimant is or ought to be aware of the grounds of challenge giving rise to at least a risk of loss": see, for example, [49] of the Defendant's skeleton argument in the WCTP proceedings, which is replicated in his skeleton argument for the others as well. There are references to risk of damage in the Claimants' pleadings. No Claimant submits in this application that the date from which time should run should be delayed by reference to its date of knowledge, actual or constructive.

Discussion

Limitation for private law claims

47. During submissions the Defendant articulated his submission in relation to the Claimants' private law claims concisely on a number of occasions of which two will suffice. The first was adopting an image for which credit appears to be due to Professor Finnis: see *R (Miller) v Secretary of State for Exiting the European Union* [2017] 1 WLR 1373 at [63]-[65]:

> "The point we are making is if the initial phase of proving breach is precluded as a matter of public law, then the reservoir of rights in the EU doesn't contain a right to damages and so nothing flows down the conduit pipe. That's the basic point."

The second, in reply, was:

> "What we are saying is that in these circumstances a successful public law challenge is a pre-condition for a successful private law claim for Francovich damages."

48. I am unable to accept this submission, however phrased. In my judgment it reflects a view through a purely public law prism that is supported by neither principle nor authority.

49. The starting point must be the established fact that a claim for damages arising from breach of duties derived from EU law should be regarded as a claim for breach of statutory duty, albeit one that is subject to *Francovich* conditions: see [15] above. That being so, s. 2 of the Limitation Act is directly applicable and provides a limitation period of 6 years. It is therefore necessary to see if there is any reason to disapply that limitation period and to apply another one.

50. The Defendant's arguments that rely upon the time limits laid down in instruments concerning procurement law are, in my judgment, misconceived. The submission (set out above) that the UK legislator has "consistently" applied a much shorter limitation period to reflect the particular character of the EU-based claim is factually incorrect,

since the UK legislature has declined to implement the Railway Regulation and has chosen to exclude railway franchise procurements from the scope of the PCR and the UCR. The Court does not know why the legislature has decided to treat railway franchise procurements differently, but it has. There is therefore no basis for either transposing the time-limits laid down by the PCR and UCR or relying upon them by way of an analogy. Those regulations, where they apply, provide carefully calibrated and balanced bundles of rights and obligations including, for example, the automatic suspension provisions at regulation 95 of the PCR and regulation 110 of the UCR. Given the carve-out which excludes railway franchise procurements from those regulations, it would be impossible to describe provisions for automatic suspension as being "consistently" applied in procurement cases or to argue that they are to be implied in railway franchise procurements. Thus, in the circumstances prevailing at present, all that can be said is that procurement cases are not all treated the same and that railway franchise cases are deliberately treated differently from other categories by the legislature of the United Kingdom.

51. A further submission that was made more than once and which appears fundamental to the Defendant's position was that:

> "We say that it's a basic principle of administrative law that a public law measure is valid if it is not challenged within the relevant time period and as such it cannot form the basis for an action for damages under EU law if it is in fact valid."

52. This submission is correct when viewed through a purely public law prism. However, as a matter of principle, it seems to me to ignore the fact that a public authority's acts or omissions may, at least in theory, give rise to enforceable private law rights and remedies without being unlawful in the public law sense of justifying judicial control of administrative action by judicial review. Furthermore, to suggest that a person may not exercise their acknowledged private law rights (which may themselves be contingent upon the continued existence of the behaviour that is criticised) without undertaking and discharging the burden of "invalidating" the offending act of the public authority seems to me to be grossly unfair, particularly if allied to the short time-limits of judicial review. I would not accept such a denial of access to justice unless compelled to do so by binding authority. The Defendant has not identified any authority in either English or European jurisprudence that begins to justify such a conclusion.

53. The submission also seems to me to confuse the purposes of public law and the private law of torts. At one point the Defendant submitted that a longer limitation period for private law claims was unsatisfactory because, with a limitation period of six years, the state would "have to take account of the court's views which may be in several years' time." I do not shrink from that prospect; but what an adverse finding in a tort claim in several years' time will *not* do is "invalidate" the underlying act as it may be "invalidated" after a process of judicial review. If and to the extent that either the prospect or the reality of an adverse tort claim discourages a tortfeasor from repeating the conduct that is held to constitute a breach of duty or persuades him to change his approach to a particular issue, it will be serving its intended and beneficial function, whether the tortfeasor is a public body or a private individual. This consideration is not, in my judgment, weakened by the fact that (as is often the case) the Defendant in the present case is charged by s. 4(1) of the Railways Act 1993 with

promoting improvements in railway service performance or otherwise protecting the interests of users of railway services or otherwise acting in the public interest.

54. I accept that there are cogent and compelling reasons why challenges to the validity of public acts should be brought promptly, which explains the shortened time limits for judicial review and, where enacted, those set out in specific regulations dealing with procurement. One well known statement of these reasons is to be found at [33] of *Jobsin.co.uk PLC v Department of Health* [2001] EWCA Civ 1241. The facts do not matter for present purposes save to note that Jobsin brought a public law challenge alleging breach of the Public Service Contracts Regulations 1993 which provided that proceedings were to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considered there were good reasons for extending the time limit. Dyson LJ said:

> "Regulation 32(4) specifies a short limitation period. That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be proceeded as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously."

55. Two points should be borne in mind. First, the application of the short time limit to all proceedings arising from alleged breaches of the duties owed under the Regulation was part of the overall balance struck by the Regulations in question. Second, the passage is expressly directed to the policy considerations in favour of rapid resolution of public law challenges. In my judgment the reasoning does not apply with the same force to a private law action which does not affect the public interest in ensuring that tenders for public projects should be processed as quickly as possible or the interest of other parties who are participating in the tender. In his oral submissions, the Defendant accepted that Dyson LJ's statement of principle refers to public law challenges but submitted that a claim for damages should be treated as "part of the overall mix because it is equally undesirable that the authority should be sitting with an in terrorem claim for damages when it proceeds with its award because its action is in the public interest". I respectfully disagree with this submission for the reasons I have given, and find support for my view in the fact that the legislature has laid down a short time-limit for public law challenges by judicial review but has not done or said anything to apply that shortened time-limit to claims founded on tort that arise out of the same facts or matters, whether the source of the obligation is EU law or domestic.

56. I therefore turn to authority to see if it supports the Defendant's position. I was referred to numerous authorities by the Defendant, and have re-read them all as directed. I do not propose to mention them all and do not consider it necessary to lengthen this judgment by detailed analysis of them, for the simple reason that I am

unable to find any clear statement that expressly or by implication supports the Defendant's primary submission.

57. *Palmisani v Instituto Nazionale Della Previdenza Sociale (INPS)* [1997] CMLR 1356 was concerned with the lawfulness of a short time limit imposed by the Member State when implementing Directive 80/987. The reasoning of the Court focussed on the principle of equivalence. I do not find it of assistance in circumstances where it is common ground that the legislature has not taken steps to implement the Railway Regulation or to impose specific time limits for railway franchise procurements.

58. Case C470-99 *Universale-Bau AG* [2002] ECR I-11655 is an example of a Member State legislating to impose very short time limits for the bringing of proceedings that seek to review decisions of a contracting authority in the course of procurements. The Claimants sought public law remedies but brought their claims out of time. The Court held that Austria was entitled to impose the very tight time-limits for which it had legislated. The rationale is given at [76]-[79]. The Court referred expressly to the desirability of ensuring that unlawful decisions of contracting authorities are "challenged and corrected" as soon as possible: see [78]. It is not suggested in the present proceedings that it would be unlawful for a member state to require claimants to bring all claims (i.e. public and private law claims) within a tight timetable as is done, for example, by the PCR and the UCR. The point of distinction is that Austria had legislated for tight time limits in the circumstances prevailing in *Universale* and the United Kingdom has not done so in the circumstances prevailing in the present case.

59. *Matra Communications S.A.S v Home Office* [1999] 1 WLR 1646 concerned Directive 89/665/EEC which was implemented by the Public Services Contracts Regulations 1993. The Directive made provision for "review" which covered the whole scheme of remedies that the Member State was required to make available. As with the PCR and UCR, the 1993 Regulations made breach of duty actionable on where a service provider "suffers or risks suffering" loss or damage; and they imposed a time limit in materially the same terms as the PCR and UCR for all claims arising under the 1993 Regulations. The Court of Appeal considered the principle of equivalence and concluded that there was no suitable comparator that was sufficiently similar to a claim under the procurement regulations as to require the time limit laid down by the regulations to be over-ruled: see 1661D-1662E. In that legislative context it is not surprising that the Court of Appeal held that the time limit for bringing a claim for damages was the same as the time for bringing a challenge to the act or decision complained of: see 1656E-1657B. The situation is not analogous to or informative for the present case where no question of revising a short statutory time limit by reference to the principle of equivalence arises since none has been enacted for the relevant private law claims. I am not persuaded that the principle of equivalence has any application to establishing the applicable limitation period in the present case where the Claimant seeks no adjustment of the six years laid down by the Limitation Act and the Defendant's complaint is that it is too long.

60. I note in passing that at 1660A-G, Buxton LJ appears to accept (or at least not to reject) the submission that, in the absence of the Regulation there being considered, the provisions of RSC Order 53 permitting the joinder of a claim for damages in judicial review proceedings would involve a limitation period of 3 months for the

public law claim but whatever period would apply for such a claim if the Claimant did not take advantage of the joinder provision.

61. For similar reasons, I am not persuaded that the decisions at first instance or in the Court of Appeal in *SITA* are relevant to determining the proper limitation period for a private law claim in the present circumstances. *SITA* involved consideration of the principle of rapidity when determining how to implement the Court of Justice's decision in *Uniplex*. The legislative context for that decision was the time limit laid down by regulation 32(4)(b) of the Public Services Contracts Regulations 1993, for which there is no comparable applicable provision in the present case. The decision provides no support for a submission that s. 2 of the Limitation Act should be overridden in the present case.

62. In addition to authority, the Defendant referred me to passages from *Judicial Remedies in Public Law* by Sir Clive Lewis, which I regard as authoritative and would regard as highly persuasive if, as the Defendant suggested, it supported the Defendant's position. As its name suggests, it is primarily, though not exclusively, concerned with public law remedies. Chapter 17 is entitled "Remedies for Enforcement of EU Law in National Courts." Having referred to paragraphs 17-086, 17-095, and 17-109 the Defendant accepted that they all indicate that s. 2 of the Limitation Act 1980 would apply to a private law claim founded on obligations that have their origin in EU law, but said that the Defendant's position was made clear by 17-112, which states (in full):

> "17-112 Although damages are a private law remedy, a claim may be attached to a claim for public law remedy in a claim for Judicial review. In practice, the court will first determine whether there has been any breach of EU law and whether the claimant is entitled to any remedies in public law, such as quashing order to quash an unlawful decision or a declaration. Then the court will deal with the question of damages."

63. In my judgment Sir Clive Lewis provides no support for the Defendant's position in these passages. I accept, of course, that if a claim for damages is attached to a claim for a public law remedy in an application for judicial review, the Court will in practice first determine whether there has been any breach of EU law and whether the claimant is entitled to any remedies in public law; and that it will then deal with the question of damages. But this says nothing about applicable limitation periods; nor does it say or imply that there is no private law remedy unless the court grants a prerogative remedy in response to the public law claim.

64. In my judgment, the Claimants are correct to submit that there is English authority that is contrary to the Defendant's submissions on the time limit for a claim arising out of breaches of private law duties that originate in EU law.

65. The first authority is *Phonographic Performance Ltd v Department of Trade and Industry and Anr* [2004] 1 WLR 2893, a decision of Sir Andrew Morritt VC. Council Directive 92/100/EEC ("the Rental Directive") was promulgated in 1992 and required Member States by July 1994 to provide a right ensuring that a single equitable remuneration should be paid to persons such as the Claimant. The Rental Directive was not implemented by the United Kingdom before or after July 1994 but the

Copyright and Related Rights Regulations 1996, which were intended to do so, were made in November 1996. Furthermore, the government did not repeal Sections 67 and 72 of the Copyright, Designs and Patents Act 1988, which the Claimant regarded as a limitation on the right to single equitable remuneration that the United Kingdom was required to implement. The Claimant took the deliberate decision not to mount a public law challenge to the failure to implement the Rental Directive or to the failure to repeal ss. 67 and 72. Instead, in March 2003 the Claimant issued a private law claim for damages and declarations on the footing that the Crown was in breach of its obligations arising under EU law by failing to provide for a single equitable remuneration to be paid by the persons and in the circumstances prescribed by ss. 67 and 72. The Claimant did not apply to bring judicial review proceedings. The Defendant raised the issue of limitation and a preliminary issue was ordered to be tried. As is conventional where a limitation strikeout is brought, the Court assumed that the Claimant's (private law) claim was established, subject of course to the issue of limitation.

66. The argument of the Crown was similar or identical to that being advanced by the Defendant in the present proceedings. As recorded at [32]-[33]:

> "32. Counsel for the Crown accepts that the claim of PPL may be brought by ordinary action. But, he submits, the cause of action is sui generis and based on a core allegation that that the UK should have amended the 1988 Act so as to repeal ss.67 and 72. He contends that such a claim is inherently a public law claim which ought to be pursued in proceedings for judicial review. To require such a procedure will enable the court to exercise control over the claims and the periods for which they may be pursued. In those circumstances, he submits the Court has jurisdiction to strike out the action as an abuse of process of its process.
>
> 33. This is disputed by Counsel for PPL. He accepts that the complaint of PPL could have been brought by judicial review. But, he contends, this is a private law claim which PPL is entitled to bring by ordinary action commenced within the limitation period."

67. The Crown's submissions were rejected. Sir Andrew Morritt V-C recognised that the breaches of public law duty that would be in play were continuing breaches. He held that, although the claims could have been brought by judicial review, it was open to the Claimant to bring them by action and that the appropriate limitation period was 6 years. In doing so he said:

> "47. I start with a consideration of the nature of the proceedings. The decision of the Divisional Court in Factortame V … was considered by the *Court of Appeal ([1998] Eu.L.R. 456)* and the *House of Lords ([2000] 1 AC 524)* … . In both those courts there was clear recognition that the effect of Francovich and subsequent cases was to subject Member States to an obligation under Community Law to compensate individuals who have sustained consequential loss

> if they satisfy the conditions identified by the ECJ in those cases. Such an obligation gives rise to a correlative right in one who has suffered such damage. Such a right is not discretionary.
>
> 48. Nor in my view can such a right be categorised as a public law right even though the Crown's obligations under Community Law and how to discharge them fall to be considered. As in the context of the Limitation Act , the remedy is for damages for breach of a statutory duty arising under Article 8.2 of the Rental Directive and s. 2(2) European Communities Act. This is recognised by the relief sought in the form of a declaration and damages. Counsel for PPL accepted that a declaration was a discretionary remedy but offered to abandon it if that mattered.
>
> 49. Neither party referred me to the provisions of CPR Part 54. Nevertheless it appears to me that though the nature of the proceedings might fall within the definition of a claim for judicial review in Rule 54.1(2)(a) if the claim for a declaration is abandoned it would be excluded by Rule 54.3(2). I do not suggest that the form of the proceedings can govern their substance but, to my mind, this confirms the view that the proceedings are essentially private law proceedings which can and prima facie should be brought by an ordinary claim.
>
> 50. I see nothing in the features on which the Crown relied to suggest that the court should regard the continuation of the claims as ordinary actions as an abuse of the process. So to do would be to subject the rights of an individual to a discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of community law."

68. I should follow the decision of the Vice-Chancellor unless I were convinced that he was wrong, which I am not. On the contrary, I respectfully agree with his reasoning and the result, both of which were substantially endorsed in *Energy Solutions*. It reinforces my view that the Defendant is wrong in his submissions to characterise the Claimants' private law claims as "quintessentially a public law claim." When pressed by the Court to explain what this phrase meant, the Defendant's answer was that: "all the obligations on which the claimants rely, apart from the implied contract, are in substance binding on the Secretary of State as a public body performing the role that that public body is required to perform under Regulation 1370." In failing to recognise that the same source of rights and obligations may give rise to separate causes of action in private law and public law respectively, I consider that the Defendant in the present case has fallen into error that goes to the heart of his submissions on these applications.

69. In *Delaney v Secretary of State for Transport* [2015] 1 WLR 5177 the Claimant's private law claim was based upon allegations that included assertions of breach of the Defendant's public law duties without bringing a public law challenge: see [6] of the

judgment of Jay J. His claim was permitted to proceed at first instance and by the Court of Appeal.

70. In response to *Delaney* and *Phonographic* the Defendant points out that the public law breaches were continuing breaches. But the fact remains that in each case the private law claims were permitted to continue in the absence of a public law challenge; and that fact is fatal to the Defendant's submission.

71. For these reasons I find that the limitation period that is applicable to the Claimants' private law claims is six years pursuant to the provisions of the Limitation Act 1980.

Limitation for Public Law Claims

72. The three-month time limit for bringing judicial review proceedings is common ground. That means that no public law challenge falling within the terms of s. 31 or CPR Part 54 may be commenced more than three months after the act or decision that is to be challenged. It is doubtless for that reason that none of the Claimants seeks a mandatory, prohibiting or quashing order in its judicial review proceedings directed at the issuing of the ITT or the Re-bid instructions as such.

73. The only legal gloss that has been raised by the Claimants is based on the decision in *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593 and *R (Eisai Ltd) v NICE* [2008] EWCA Civ 438.

74. In *Burkett* the House of Lords held that time for bringing judicial review proceedings ran from when planning permission was granted and not the earlier date upon which the Council resolved to grant it. It reached this conclusion notwithstanding the clear finding that the Claimant could have applied to challenge the earlier resolution: see [38] per Lord Steyn. It follows that there may be a series of acts or decisions which could be susceptible to a public law challenge by judicial review but that it is not a prerequisite to challenging a given act or decision that the Claimant challenges all earlier acts or decisions in the series. As Lord Steyn put it, rather more elegantly, at [39] "… the date of the resolution does not trigger the three-month time limit in respect of a challenge to the actual grant of planning permission." Since the granting of a prerogative remedy in judicial review proceedings is a discretionary jurisdiction, circumstances may arise where a Claimant who adopts what might be called a "*Burkett* approach" may be denied a remedy because of the impact it might have on interested parties or good administration. Such an enquiry is well beyond the scope of a strikeout application but demonstrates that both the giving of permission and the granting of remedies in judicial review proceedings will be fact-sensitive: see generally, *Sir Clive Lewis op cit* at 9-023 and Lord Hope at [64] of *Burkett*.

75. The question then arises whether and to what extent a claimant mounting a public law challenge against a later act or decision may refer to and rely upon alleged breaches of public law duties in an earlier act or decision which itself could have been the subject of a public law challenge. Guidance on this point is to be found in *Eisai*. In the course of a consultation process NICE in early 2005 made available to consultees including the Claimant a read-only version of an economic model which was used to assess the cost-effectiveness of drugs. The consultation process continued, culminating in the issuing of guidance in November 2006. The Claimant issued judicial review proceedings alleging that the non-provision of a fully executable

version of the model rendered the consultation process unfair and that the decision to issue the guidance was in consequence unlawful. One of the points taken on behalf of NICE was that relief should be refused on grounds of the Claimant's delay in bringing proceedings. Richards LJ, with whom the other members of the Court agreed, said:

> "69. …The argument is that the refusal to supply the fully executable version was the subject of a clear decision by NICE which was capable of being challenged at the time; yet Eisai waited some 18 months, until the end of the appraisal process, before mounting its challenge. There was a failure to apply within the time limit laid down in CPR 54.5(1) ("promptly and in any event not later than 3 months after the grounds to make the claim first arose"), and there was therefore "undue delay" within the meaning of the statute. Had a prompt challenge been made, the court would have entertained it at that time, rather than allowing the appraisal process to continue for over a year in circumstances of doubt as to its lawfulness.
>
> 70. I do not accept that the court would have viewed an early challenge in that way. It is more likely that such a challenge would have been considered premature and inappropriate. At the time when NICE refused to release the fully executable version, it was uncertain what the outcome of the appraisal process would be. The Final Appraisal Determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable version would have been academic. Further, and very importantly, Eisai had a right of appeal to the Appeal Panel against that determination, and the grounds on which such an appeal lay included procedural unfairness. That might well have been viewed as providing an appropriate alternative remedy, rendering a judicial review challenge inappropriate at that stage.
>
> 71. Even if there had been undue delay in applying for judicial review, it would only be a factor to be taken into account in the exercise of the court's discretion as to the grant of relief; and in the light of the matters set out below it would in my view be of no materiality.
>
> 72. Mr Pannick made clear that Eisai does not seek to have the existing guidance quashed if that can be avoided. It simply wants the fully executable version to be released to it and to have an opportunity to make representations on it, with a view to NICE making a further determination in the light of any such representations and with a right of appeal to the Appeal Panel if the further determination is adverse to Eisai. If that course can be achieved, as may well be possible through the provision of an appropriate undertaking by NICE, then it seems to me to be an eminently sensible one.

> 73. Mr Pannick also indicated that Eisai would want the court to make a declaration. For my part, I doubt whether a formal declaration would be appropriate. The judgment will speak for itself."

76. Four points emerge from this passage. First, it was predicated on the view that a public law challenge at the time of the refusal to supply the fully executable version may have been regarded as premature since it was then uncertain what the outcome of the appraisal process would be: this observation was expressed in terms of likelihood, reflecting the fact-sensitive nature of the exercise. The point was not fully argued by the Defendant. As things stand, it is not obvious (and the Defendant has not established to the level of certainty required for a strikeout application) that the approach adopted in *Eisai* is or should be limited to circumstances when an earlier challenge would have been ruled to be premature. Second, the Court accepted that the decision not to provide the fully executable version (some 18 months before proceedings were issued) tainted the conclusion of the consultation (in respect of which proceedings were issued in time). Third, the Court of Appeal took the view that the question of delay would go to the exercise of the Court's discretion in relation to the granting of relief. On the facts identified by the Court of Appeal in [72]-[73], the Court expressed the view that delay in that case would be of no materiality. Fourth, the Court of Appeal at [73] took a pragmatic view of the utility of declaratory remedies, which are themselves discretionary. That is an approach which the Court should willingly adopt.

77. In the present proceedings, it appears to be at least arguable (for the purposes of the strikeout applications) that the principles laid down in *Burkett* and *Eisai* may have application in relation to the public law challenges now mounted by the Claimants against the decision to disqualify them from the franchise procurements. WCTP's skeleton argument puts the point succinctly for all Claimants. Its case is that it "complains here of a decision taken on the basis of a process which was itself unlawful."

78. The potential relevance of *Burkett* and *Eisai* was illustrated by Stagecoach in their oral submissions by reference to [30]-[60] of SSETL's Part 7 Particulars of Claim (which are, so far as I have been able to tell, replicated by [34]-[64] of SSETL's Statement of Facts and Grounds). The pleading portrays the process leading up to the disqualification decision as an iterative and ongoing discussion which, despite the apparently hard-edged terms of the ITT and Re-bid instructions, rendered the process fluid and, in *Burkett* terms, uncertain. One aspect of this approach that Stagecoach emphasised in oral submissions is that SSETL pleads that it had submitted a first rebid in August 2018 which was not compliant but which did not cause the Defendant to disqualify it.

79. I am not in a position to rule at all on the facts and the case being advanced by the Claimants save to say that the Defendant has not shown to the necessary standard for a strikeout that the Claimants' case discloses no reasonable grounds for relying upon the principles established in *Burkett* and *Eisai* or that the Claimants' prospects of success in relation to those principles are fanciful. In reaching this conclusion I have regard to the fact that, in a not-entirely settled area of the law, the final determination of the Court will be fact sensitive and that it is plain from the materials now before the

Court that there is evidence (on both sides) that can reasonably be expected to be available at trial that is not available now.

Abuse of process

80. As developed in written and oral submissions, the Defendant submits that it would be an abuse of process to use private law remedies to achieve the result that should properly be sought and, if appropriate, obtained by judicial review.

81. I have dealt above with the implications of an action for damages. In my judgment no question of abuse of process arises from the fact (if it be the fact) that a Claimant issues proceedings for a private law remedy in damages within the limitation period for such claims but outside the three months that is applicable to public law claims that are required to be brought by judicial review. A passage in a Part 7 pleading that is relevant to such a claim should therefore not be struck out.

82. Separate considerations apply to what I have called the "cross-over" remedies, namely injunctions and declaratory relief.

83. The Defendant relies heavily upon an important passage from the decision of the Court of Appeal in *Trim v North Dorset District Council* [2011] 1 WLR 1901. At [20]-[26], Carnwath LJ (with whom the other members of the Court agreed) said:

> *"The exclusivity principle*
>
> 20. The main issue in the present case turns on the effect of the so-called exclusivity" principle, established in O'Reilly v Mackman [1983] 2 AC 237: that is, that in general it is an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. Among the factors leading to this conclusion was the streamlined procedure by then available for judicial review, the requirement for leave, and the short time-limit (normally three months) for commencing proceedings. Lord Diplock said:
>
> "The public interest in administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision." (p 281A, see also p 284E)
>
> 21. Subsequent experience has shown that a clear division between public and private law is often difficult to maintain, and the rigidity of the rule has had to be relaxed accordingly. Wade and Forsyth Administrative Law 10th Ed p 570–81 gives a valuable description of this evolutionary process, leading to the emergence of "signs of liberality", and to some abatement of the "rigours of exclusivity" under the new CPR. A particular area of difficulty was in relation to private law disputes involving public authorities, for example employment and

contractual relations (*ibid* p572). In *Roy v Kensington and Chelsea FPC [1992] 1 AC 624*, the scope for relaxation of the rule was acknowledged by the House of Lords, when they accepted that private law rights could be enforced by civil action, even though they might involve a challenge to a public law decision or action (*ibid* p578).

22. De Smith's judicial review 6th Ed para 3-097 contains a similar account, suggesting that a "new approach" is required following the replacement in 2002 of Order 53 by the new CPR 54:

"What matters under the CPR regime is not the mode of commencement of proceedings but whether the choice of procedure may have a material effect on the outcome."

Cases such as Clark v University of Lincolnshire [2000] 1 WLR 1988 (a case involving an alleged breach of contractual relationship with a public authority) are cited to support the proposition that the courts should avoid "sterile and expensive procedural disputes which may be of no practical significance to the outcome of the case" (para 3-103). There is a discussion to similar effect in the White Book (para 54.3.2: "Distinction between public and private law").

23. The problems described in those passages arose principally from cases in which private and public law principles overlapped (see De Smith para 3-102). I do not read them as seeking to undermine the principles that purely public acts should be challenged by judicial review, and that it is in the public interest that the legality of the formal acts of a public authority should be established without delay. The latter is confirmed by the retention in CPR 54 of the requirement that an application to bring judicial review proceedings must be made promptly, and in any event within three months. This principle is not undermined by the fact that it is subject to the general power to extend time-limits (CPR 3.1(2)(a)), the exercise of which is itself governed by well-established principles (see 2010 White Book para 3.1.2, 54.5.1).

24. Nor do I find in the textbooks support for the suggestion that the existence of factual disputes is a reason for an exception to the exclusivity principle. The need to resolve such disputes does not often arise, because of the nature of most judicial review proceedings. But, when it does arise, it does not create any particular conceptual or procedural problems. The permission stage gives the court full control of the proceedings. It may give any necessary directions for the attendance of witnesses and cross-examination (CPR 8.6(2)-(3) , not disapplied by CPR 54.16 : see White Book para 54.16.1-2, *R (G) v Ealing LBC(No 2) [2002] EWHC 250 (Admin)* para 20).

> 25. …
>
> 26. The exclusivity principle is in my view directly applicable in the present case. The service of a breach of condition notice is a purely public law act. There is strong public interest in its validity, if in issue, being established promptly, both because of its significance to the planning of the area, and because it turns what was merely unlawful into criminal conduct. It is an archetypal example of the public action which Lord Diplock would have had in mind. It does not come within any other categories identified in Wade and Forsyth or De Smith as requiring a more flexible approach."

84. The Defendant also referred to Volume 1 of the White Book at page 1929 where 54.3.2 addresses the distinction between public law and private law which commences:

> "The judicial review procedure has special provisions designated to protect public bodies, most notably, a short time limit and the need to obtain permission. Declarations and injunctions remain available by way of an ordinary Pt 7 or Pt 8 claim where these restrictions do not apply. The courts have had to consider the extent to which a declaration or injunction may be sought by way of an ordinary claim where the claim raises public law issues that could have been brought by way of a claim for judicial review."

85. As was made clear in the passage I have cited above, the service of the breach of condition notice in *Trim* was described as "a purely public law act", meaning that the act did not engage any private law considerations. That much is clear from the facts of the case as set out at 1902G-H, which show that the Claimant was not claiming anything that was not directly contingent upon challenging the validity of the enforcement notice. As is equally clear, the present litigation is not concerned with "purely public law acts", for the reasons outlined above.

86. However, the principle still stands that public law challenges to the validity of public acts, which are subject to the full force of the considerations outlined in *O'Reilly v Mackman* and [20] of *Trim* should be brought by judicial review and not otherwise. Once a degree of precision is introduced to discriminate between public law challenges and private law claims, this should pose no difficulty in practice. I would re-state the principle in [20] of *Trim* by saying that it would be an abuse of process to use private law remedies in an attempt to replicate the effect of a public law challenge that s. 31 requires to be brought by an application for judicial review without submitting to at least the substance of the judicial review procedure laid down by CPR Part 54 including, in particular CPR Part 54's provisions as to time limits and permission. In the present case it may be said that the Court's case management decision to stay the judicial review means that it is neither automatically nor necessarily an abuse of process to pursue a public law challenge in the Part 7 proceedings; but the general principle is clear and is aimed at preventing the use of private law remedies to try to replicate and in that sense bypass the mandatory

provisions of s. 31 and CPR Part 54 without submitting to the substance of the usual restraints of time limits and permission .

87. This does not mean that to include a claim for a declaration or an injunction as a private law remedy is necessarily or even probably an abuse of process in a case that engages both public law and private law rights and remedies. Two reasons support this conclusion. First, the cross-over remedies are discretionary and, provided their deployment is not merely an attempt to bypass s. 31 and CPR Part 54, may prove to be useful (or not) at the conclusion of a case, particularly when it is a case as complicated as the present one. Second, it is clear that one reason why the Claimants have, to a greater or lesser extent, pleaded the kitchen sink *and* issued both Part 7 and judicial review proceedings is to avoid just the sort of jurisdictional wrangling that has ensued: see *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at [27]-[37] per Lord Woolf MR.

The Individual Applications

88. The Defendant's notices of application, draft orders and skeleton arguments were served together in accordance with directions of the Court. Neither the notices nor the draft orders identified specifically what passages of the relevant Claimant's Part 7 pleadings the Defendant wished to strike out; but that was done by the skeleton arguments and attached schedules, which identified the passages and claims for relief that the Defendant said should be struck out, and which then formed the basis for the Claimants' written responses, the Court's preparation, and the Defendant's oral submissions. During day one of the hearing I suggested that it might be convenient to have a table that set out the paragraphs that the Defendant submitted had no relevance to a private law claim and only had relevance to a public law claim arising more than three months before proceedings were issued. I had thought, over-optimistically as it turned out, that this might lead to a reduction in the number of passages on which a decision was required. With considerable industry, the Defendant produced tables overnight and distributed them shortly before commencement of day two of the hearing, by which time the Claimants were well into their responsive submissions. The arrival of the new tables generated protests from the Claimants that it was too late to consider them before the hearing and that they expanded the scope of what was sought to be struck out beyond what had been identified in the skeleton arguments. To meet the first objection, the Claimants were given time to respond to the tables in writing after the hearing. The second objection stands. I have looked at the new tables de bene esse with a view to identifying what, if anything should be struck out at this stage. WCTP and Arriva have responded concisely to the new tables. Stagecoach has reserved its position on paragraphs that have been added by the new tables.

The WCTP Application

89. In his skeleton argument, the Defendant identified the passages in WCTP's Part 7 Particulars of Claim that he submitted should be struck out as:

    i) [94]-[95] and [105]-[106] on the basis that they challenge the unlawful design of the procurement competition, including the extent of the Defendant's discretion and lack of guidance as to how non-compliances would be treated,

submitting that such facts were known at the time they arose and, in any event, more than three months before proceedings were issued;

ii) [94]-[101] on the basis that they challenge the substance of the pension requirements as set out in the Re-bid instructions and favour certain types of bidders, submitting that such facts were known at the time they arose, which was more than three months before proceedings were issued;

iii) [102]-[106] on the basis that they relate to changes in the procurement rules part way through the procurement process, submitting that such facts were known at the time they arose, which was more than three months before proceedings were issued. [105]-[106] are attacked on the additional ground that they relate to the ability of the Defendant to determine and vary the terms of the Franchise Agreement unilaterally, which the Defendant submits was clear on the face of the ITT from the date of its issue; and

iv) [107]-[108] on the basis that they challenge the admission of a new subcontractor, RENFE by MTR, of which WCTP was informed in June 2018, well in advance of MTR's announcement on 20 December 2018 that it would participate in the bid, that later date still being more than three months before proceedings were issued.

90. It is not clear from his summary table provided on day two whether the Defendant still submits that these paragraphs should be struck out. What the table adds is a submission that specific parts of WCTP's claim for relief as set out at [121] of the Particulars of Claim should be struck out. I have set out the claim for relief at [20] above. The Defendant submits that:

i) Sub-paragraphs (i)(a) and (b) should be struck out as they relate to public law claims that are time barred;

ii) Sub-paragraphs (ii)(a), (b) and (c) should be struck out as remedies seeking in substance to challenge the design of the procurement, quash the ITT and re-start the procurement process are time-barred. In the alternative it is submitted that sub-paragraph (ii)(c) needs to be amended;

iii) Sub-paragraphs (iii)-(vi) insofar as the relief relates to loss allegedly caused by MTR's continuation in the tender process as that claim is time-barred.

91. In the light of the principles that I have set out above:

i) It would not be appropriate to strike out the paragraphs of the pleading identified in the Defendant's skeleton argument and at [89] above as each is relevant to the private law claim for damages being brought by WCTP;

ii) It is not open to WCTP to bring a direct public law challenge to set aside the original ITT or the introduction of the pension requirements or the Re-bid instructions as such, since such a challenge would have to be brought within three months and was not. WCTP also recognises that no public law challenge to the decision to admit RENFE to MTR's bid as such was brought on any view within the three month judicial review time limit;

iii) Equally, it would not be open to WCTP to use the discretionary private law remedies of declaratory relief and injunction to replicate and in that sense bypass the mandatory requirements of s. 31 and CPR Part 54 for bringing a public law challenge by judicial review;

iv) WCTP has brought its judicial review proceedings to mount a direct public law challenge to matters occurring within the three month time limit and has not included in the relief claimed in those proceedings any public law challenge to matters occurring outside the three month time limit;

v) For the purposes of this strikeout application, WCTP is entitled to refer to matters occurring more than three months before the issue of proceedings in support of its public law challenge to matters occurring within three months before the issue of proceedings on the principles laid down by *Burkett* and *Eisai;*

vi) Turning to the relief claimed in WCTP's Part 7 proceedings:

a) Sub-paragraph (i) does not on any view seek to use the discretionary private law remedy of declaratory relief to replicate and in that sense bypass the mandatory requirements of s. 31 and CPR Part 54 for bringing a public law challenge by judicial review. The making of a declaration in the terms sought would not "invalidate" the acts or decisions that would be the subject of the declarations and is therefore not abusive. Referring back to [73] of *Eisai*, for my part I doubt whether a formal declaration would be appropriate since it is unlikely to add anything: any judgment is likely to speak for itself. However, since the prayer for this relief is not demonstrably abusive, it would be wrong to strike it out. The better course is to wait and see if, contrary to my doubts, there are good reasons to use the discretionary remedy of a declaration at the end of the trial;

b) It is notable that the Defendant's objection to the relief claimed in sub-paragraph (ii) is that it is in substance a public law challenge to the design of the procurement, an application to quash the ITT and to restart the Procurement process and that, as such, it is time barred. WCTP's response to this is to rely upon *Burkett* and *Eisai* which, in my judgment, has a realistic prospect of success. The Defendant does not take the technical objection that the relief was such that s. 31 requires to be brought exclusively by judicial review, which appears to be a welcome concentration on substance over form and means that I do not have to decide the point. What can be said, however, is that if it is in substance a claim that should be brought by judicial review, WCTP may be faced with an argument at a later date based upon the date of issue of the Part 7 proceedings since it appears plain that the relief claimed in the judicial review proceedings is more limited than that sought under [121(ii)];

c) Sub-paragraphs (iii) to (vi) are not statute barred and, for the reasons set out above, there is no reason to strike them out or modify them.

92. [121](ii)(c) seeks an injunction requiring the Defendant "to restart the Procurement on a lawful basis". For the reasons set out below in relation to SEMTL's equivalent prayer, I consider that these words should be struck out on the same basis as SEMTL's.

93. Subject to that one exception, therefore, I refuse the application to strike out any part of WCTP's Part 7 Particulars of Claim.

The SEMTL Application

94. In his skeleton argument, the Defendant identified the passages in SEMTL's Part 7 Particulars of Claim that he submitted should be struck out as:

    i) [73], [74(a)] and [74(b)] on the basis that they attack the allegedly unlawful rules and the discretion conferred by the ITT, submitting that these were known on publication of the ITT, more than three months before the issuing of proceedings;

    ii) [73], [74(e)], [76(b)], [76(f)] and [78(e)] on the basis that they attack the imposition of the pension requirements part way through the tender process, submitting that the relevant facts occurred and were known when the changes were made, more than three months before the issuing of proceedings;

    iii) [73], [74(e)(v)], [76(f)] and [80(a)] on the basis that they attack the legality or rationality of the pension requirements and the Re-bid instructions, submitting that the object of these attacks occurred and were known to have occurred more than three months before the issuing of proceedings; and

    iv) The prayer at [80]-[85] "insofar as they relate to tender process complaints".

95. It is not clear from his summary table provided on day two whether the Defendant still submits that these paragraphs should be struck out. What the table adds (apart from identifying additional paragraphs) is a submission that [83] and paragraph 2 of the prayer should have the words "and/or restart the Procurement on a lawful basis" should be deleted. I have set out paragraph 2 of the prayer at [20] above.

96. In the light of the principles that I have set out above:

    i) It would not be appropriate to strike out the paragraphs of the pleading identified in the Defendant's skeleton argument and at [94] above as each is relevant to the private law claim for damages being brought by SEMTL;

    ii) It is not open to SEMTL to bring a direct public law challenge to set aside the original ITT or the introduction of the pension requirements or the Re-bid instructions as such, since such a challenge would have to be brought within three months and was not;

    iii) Equally, it would not be open to SEMTL to use the discretionary private law remedies of declaratory relief and injunction to replicate and in that sense bypass the mandatory requirements of s. 31 and CPR Part 54 for bringing a public law challenge by judicial review;

iv) SEMTL has brought its judicial review proceedings to mount a direct public law challenge to matters occurring within the three month time limit and has not included in the relief claimed in those proceedings any public law challenge to matters occurring outside the three month time limit;

v) For the purposes of this strikeout application, SEMTL is entitled to refer to matters occurring more than three months before the issue of proceedings in support of its public law challenge to matters occurring within three months before the issue of proceedings on the principles laid down by *Burkett* and *Eisai;*

vi) Turning to the relief claimed in SEMTL's Part 7 proceedings as set out at [20] above:

a) A declaration in the terms sought in paragraph 1 would not "invalidate" the acts or decisions that would be the subject of the declarations and is therefore not abusive. For the same reasons as given in relation to WCTP's prayer for declaratory relief, I doubt whether a formal declaration will prove to be appropriate or necessary; but the better course is to wait until the end of the trial to see whether a declaratory remedy serves a useful purpose;

b) The Defendant has shifted his position in the new table, by focusing on the prayer for an injunction directing the Defendant to restart the procurement on a lawful basis. The Defendant submits that "in light of the Defendant's submissions in respect of the Claimants' inability to quash and/or otherwise vary the terms of the competition … the Defendant denies that the Claimant is otherwise able to seek by way of remedy the restarting of the competition." SEMTL's response is that this remedy is a private law remedy and that the proceedings were brought within three months of the decision to disqualify. I accept that submission, but it does not provide a full answer to the Defendant's objection;

c) There are two problems with this head of relief. First, such an order, if it is to be made, appears to me to fall squarely within the ambit of s. 31 and CPR Part 54. It is not replicated in the prayer for relief in SEMTL's judicial review proceedings and, if things remain as they are now, SEMTL may be faced with an argument based on the date on which the Part 7 proceedings were issued. Secondly, and more fundamentally, I cannot at present conceive of circumstances in which the Court would make such an order in this case. It is within the competence and power of the Court to set aside the decisions that have been made where a direct public law challenge is made, but it would then be for the Defendant to decide what to do in the light of the decisions that the Court has made. Obviously if he were to decide to restart the procurement he should do so on a lawful basis; but the decision on how to proceed would be his and I cannot envisage that the Court would direct him to restart;

d) As things stand, therefore, this appears to me to be an inappropriate claim for relief, whether framed as a public law remedy or a private law one, for reasons that are rather different from those advanced by the Defendant in the new table. As such I would strike out the words but on the basis that, if it later appeared that this was a necessary and appropriate remedy, SEMTL would then be entitled to apply to amend to re-plead the prayer for relief.

97. For the avoidance of doubt, having read the new table de bene esse, and without hearing further from Stagecoach, my decision would be the same in relation to the paragraphs that have been added by the new table as it is in relation to the paragraphs that were included in the skeleton argument and identified above.

98. I therefore strike out the words "and/or restart the Procurement on a lawful basis" on the basis set out above but otherwise refuse the application to strike out any part of SEMTL's Part 7 Particulars of Claim.

The SSETL Application

99. The Defendant's approach and SSETL's response mirrors their approach and response in the SEMTL application.

100. For the same reasons I reach the same conclusion as set out above in relation to the SEMTL application, namely that I strike out the words "and/or restart the Procurement on a lawful basis" but otherwise refuse the application to strike out any part of SEMTL's Part 7 Particulars of Claim.

The Arriva Application

101. In his skeleton argument, the Defendant identified the passages in Arriva's Part 7 Particulars of Claim that he submitted should be struck out as:

i) [106] on the basis that it challenges the unlawful design of the procurement competition, including the extent of the Defendant's discretion, lack of transparency and lack of guidance as to how non-compliances would be treated, submitting that such facts were known at the time they arose and, in any event, more than three months before proceedings were issued;

ii) [107] on the basis that it challenges the substance of the pension requirements and the issuing of the Re-bid instructions and favour certain types of bidders, submitting that such facts were known at the time they arose, which was more than three months before proceedings were issued;

iii) [110] on the basis that it relates to changes in the procurement rules part way through the procurement process, submitting that such facts were known at the time they arose, which was more than three months before proceedings were issued; and

iv) [121(a)], which was originally identified under the heading "remedies" but is identified in the new table as being subject to attack on the basis that "public law claims regarding the design and content of the Pensions Requirement are

time barred. Other arguments regarding efficiency or economy or users' benefits and interests could, and should have been raised over 3 months ago."

102. The new table identifies sub-paragraphs (2), (3) and (4) of the prayer "insofar as they seek prerogative remedies that have been challenged out of time." It also identifies [126(b), (c) and (d)], which are in the same terms as sub-paragraphs (2), (3) and (4) of the prayer. I have set out Arriva's prayer at [20] above.

103. The new table raises additional paragraphs as candidates for strike out. I have read the table de bene esse and considered the paragraphs that are identified. They raise no new matters of principle.

104. In the light of the principles that I have set out above:

i) It would not be appropriate to strike out the paragraphs of the pleading identified in the Defendant's skeleton argument and at [101] above as each is relevant to the private law claim for damages being brought by Arriva;

ii) It is not open to Arriva to bring a direct public law challenge to set aside the original ITT or the introduction of the pension requirements or the Re-bid instructions as such, since such a challenge would have to be brought within three months and was not;

iii) Equally, it would not be open to Arriva to use the discretionary private law remedies of declaratory relief and injunction to replicate and in that sense bypass the mandatory requirements of s. 31 and CPR Part 54 for bringing a public law challenge by judicial review;

iv) Arriva has brought its judicial review proceedings to mount a direct public law challenge to matters occurring within the three month time limit and has not included in the relief claimed in those proceedings any public law challenge to matters occurring outside the three month time limit;

v) For the purposes of this strikeout application, Arriva is entitled to refer to matters occurring more than three months before the issue of proceedings in support of its public law challenge to matters occurring within three months before the issue of proceedings on the principles laid down by *Burkett* and *Eisai;*

vi) Turning to the relief claimed in Arriva's Part 7 proceedings:

a) Arriva has not attempted to place its claims for public law relief only in the judicial review proceedings and its claims for private law remedies only in the Part 7 proceedings, preferring the kitchen sink approach in both. While technically imperfect, this does not cause any real difficulty. What is clear is that (2), (3) and (4) of the prayer on their face appear to relate to Arriva's public law challenges which, for the reasons I have given, survive the Defendant's attempt to strike them out because they directly challenge acts or decisions happening within the three month time limit for judicial review;

b) Paragraph (3) of Arriva's prayer includes "an order that the Procurement be re-run in full accordance with the Defendant's obligations." This appears to me to suffer from the same defect as the provision in Stagecoach's cases: see [96] above. For the same reasons and on the same basis, it should be struck out.

105. Subject to that exception, therefore, I refuse the application to strike out any part of Arriva's Part 7 Particulars of Claim.