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Case No: HT-2021-000231

Case No. HT-2021-000344

Case No. HT-2021-000391

Case No. HT-2021-000399

Case No. HT-2021-000424

Case No. HT-2021-000434

Case No. HT-2022-000168

Claim No: CO/3119/2021

Claim No: CO/3523/2021

Claim No: CO/3897/2021

Claim No: CO/1729/2022

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

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

Date: 17/08/2022

Before:

MRS JUSTICE O'FARRELL DBE

Between :

SIEMENS MOBILITY LIMITED

Claimant

- and -

HIGH SPEED TWO (HS2) LIMITED

Defendant

- and -

**(1) BOMBARDIER TRANSPORTATION UK
LIMITED**

**Interested
Parties**

(2) HITACHI RAIL LIMITED

Fionnuala McCredie QC, Ewan West & John Steel (instructed by **Osborne Clarke LLP**) for
the **Claimant**

Sarah Hannaford QC, Simon Taylor & Ben Graff (instructed by **Herbert Smith Freehills
LLP**) for the **Defendant**

Azeem Suterwalla (instructed by **Allen & Overy LLP**) for the **Interested Party**

Hearing date: 25th July 2022

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.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 17th August 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the Court is the application by the Claimant (“Siemens”) for permission under CPR 35.4(1) for each party to adduce and rely upon evidence from an independent expert witness in the field of rolling stock dwell time, door configuration, seat configuration and rolling stock platform interface.

The procurement challenge

2. The proceedings concern a challenge by Siemens in respect of a procurement exercise carried out by the defendant (“HS2”) under the Utilities Contracts Regulations 2016 (“the Regulations”) relating to (i) a manufacture and supply agreement of a minimum fleet of 54 rolling stock units for the HS2 railway; and (ii) a train services agreement for a minimum period of 12 years with optional extensions over the life of the rolling stock.
3. The procurement was commenced on 21 April 2017 by a notice published in the Official Journal of the European Union and was conducted using a negotiated procedure, with five stages of evaluation to identify the lead tenderer:
 - i) Stage 1 comprised the submission of the tender, including a declaration that the bid complied with the mandatory Train Technical Specifications (“TTS”);
 - ii) Stage 2 consisted of three scored elements: Stage 2.1 – levels of compliance with the TTS; Stage 2.2 – deliverability of the trains to the stated TTS; and Stage 2.3 - the maintenance technical plan response;
 - iii) Stages 3 and 4 concerned assessment of the delivery plans;
 - iv) Stage 5 comprised evaluation of the whole life value (“WLV”) of the bids.
4. On 31 March 2021 HS2 approved as ‘lead tenderer’ a joint venture between the interested parties, Bombardier and Hitachi, (“the JV”). On 29 October 2021 HS2 notified Siemens that it had decided to award the contract to the JV. On 30 November 2021 HS2 entered into the contract with the JV.
5. On 18 June 2021, Siemens issued proceedings in the TCC by way of a Part 7 claim under the Regulations. It also issued a claim for judicial review on 24 June 2021. Subsequently, additional Part 7 claims and judicial review claims were issued, all of which have been consolidated, and consolidated pleadings have been served.
6. The grounds of challenge include the following pleaded allegations in the Re-re-re-amended consolidated Particulars of Claim dated 13 May 2022 (“the POC”):
 - i) the JV was permitted to continue to Stage 5 of the procurement exercise despite its failure to satisfy the evaluation threshold for testing (DP1.5) and therefore submitting a shortfall tender;
 - ii) HS2 consented to a change of control of the JV, following Alstom's acquisition of Bombardier, permitting a change of circumstances and sharing confidential and commercially sensitive information with Alstom and the JV, giving them an unfair advantage;

- iii) HS2 identified an operational problem in respect of the JV's train design, in that the number of doors on each side of the train unit gave rise to a significant risk to its ability to achieve the required two-minute dwell times on conventional rail network stations but, despite that, failed to verify whether the JV satisfied TTS-94, TTS-2635 or TTS-1963 and/or decided to permit a substantial modification to the JV design to be made post contract;
 - iv) the Stage 5 WLV evaluation was flawed in that the differential between the assessed price of Siemens and that of the JV failed to take into account the impact of modifications necessary to rectify the JV design issues concerning dwell time;
 - v) HS2 wrongly concluded, following an abnormally low tender review, that the JV's pricing was explained and justified;
 - vi) HS2 acted in manifest error in its decision to make the JV 'lead tenderer' without accounting for evidence of earlier failures of both Bombardier and Hitachi in relation to other rolling stock contracts;
 - vii) the decision by HS2 to award the contract to the JV was manifestly erroneous because the JV no longer had the ability, resources or financial standing to perform the contract.
7. The Re-re-amended Defence dated 14 June 2022 ("the Defence") includes the following responses to the allegations:
- i) the JV met the overall DP1 evaluation threshold; HS2 exercised its discretion in accordance with the tender conditions to deem the JV's shortfall tender as meeting the evaluation threshold for testing, as confirmed to Siemens in January/February 2021;
 - ii) following the merger, Alstom and the JV were obliged to notify HS2 of the change in circumstances, including which tenderer would continue in the procurement exercise; there was no improper sharing of information;
 - iii) the mandatory dwell time was based on based on a model designed to assess compliance at a station on the HS2 network, rather than conventional rail network stations; the JV's stage 2.2 scores supported its stated compliance with mandatory TTSSs, including TTS-94, which contained the two-minute dwell time as a fixed parameter; TTS-2635 and TTS-1963 were generic, non-mandatory requirements;
 - iv) although modelling was carried out to consider potential improvements to dwell time and accessibility, no decision was made and no technical or commercial change process was initiated with the JV prior to contract; in any event, the differential between the assessed price of Siemens and that of the JV would not have been material to the tender outcome;
 - v) HS2 carried out an abnormally low tender review on both Siemens' tender and the JV tender, and concluded that the pricing in both was explained and justified;

- vi) HS2 carried out pre-contract award checks which did not give rise to any grounds to reconsider the status of the JV as lead tenderer;
 - vii) HS2 acted properly and within its margin of discretion in finding that none of the issues considered in the pre-contract award checks presented grounds to reconsider the award of the contract to the JV.
8. The trial is fixed for 14 November 2022 with an estimate of 16 days.

The application

9. By paragraph 10 of the Order dated 25 November 2021, the court ordered that any party wishing to rely on expert evidence must seek permission from the court to do so by no later than 4.30pm on 28 January 2022.
10. On 28 January 2022 Siemens issued an application, seeking an order permitting the parties to call up to two independent expert witnesses each in the fields of: (a) rolling stock design, engineering and testing; and (b) rolling stock manufacturing and maintenance costs. On 4 February 2022 that application was adjourned by consent.
11. On 27 May 2022 Siemens issued a revised application for permission under CPR 35.4(1) for each party to adduce and rely upon evidence from an independent expert witness in the field of rolling stock dwell time, door configuration, seat configuration and rolling stock platform interface.
12. The application is supported by the fourth witness statement of Craig McCarthy, solicitor of Osborne Clarke LLP, dated 27 May 2022 and his fifth witness statement dated 19 July 2022.
13. The application is opposed by HS2 and reliance is placed on the fifth witness statement of Nusrat Zar, solicitor of Herbert Smith Freehills LLP, dated 15 July 2022.

The applicable test

14. The principles applicable to any application by a party to rely on expert evidence are not in dispute.
15. CPR 35.1 provides that:
- “Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.”
16. Although the court’s permission is not generally required to instruct an expert, the court’s permission is required before an expert’s report can be relied upon or an expert can be called to give oral evidence (CPR 35.4).
17. Experts may provide evidence on any matter relevant to the issues to be decided by the court on which the expert is qualified to give expert evidence, including an issue in the proceedings, although they may not usurp the role of the court in determining such issues: Civil Evidence Act 1972 s.3(3); *Liddell v Middleton* [1996] PIQR (CA) per Stuart-Smith LJ at p.43:

“We do not have trial by expert in this country; we have trial by judge.”

18. In *R. (AB) v Chief Constable of Hampshire Constabulary* [2019] EWHC 3461 (Divisional Court) at [117], Dame Victoria Sharp, PQBD made the following observations as to the value of expert evidence in claims for judicial review:

“... it follows from the very nature of a claim for judicial review that expert evidence is rarely reasonably required in order to resolve such a claim ... While there will be some occasions when expert evidence is needed on some technical issue, the views of experts on whether or not a decision is rational or otherwise lawful in public law terms will not be admissible. See generally the observations of the Divisional Court in *R (Law Society) v Lord Chancellor* [2018] EWHC 2090 (Admin) at para 36.”

19. In the context of procurement claims, the circumstances in which expert evidence will be permitted was considered by Coulson J (as he then was) in *By Development Limited v Covent Garden Market Authority* [2012] EWHC 2456 (TCC):

“[20] In summary, I consider that the authorities demonstrate that, where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the decision; and in part because such evidence may usurp the court's function.

[21] All of that said, however, I believe that it goes too far to say that expert evidence can never be admissible in public procurement cases concerned with manifest error. In some cases, it may be required by way of technical explanatory evidence (*Lynch*). In addition, there may be other cases where, unusually, such evidence is both relevant and necessary to allow the court to reach a conclusion on manifest error. That may be particularly so where the particular issue is specific and discrete, such as a debate about one of the criteria used in the evaluation (*Henry Bros*) or complex issues of causation (*Harmon*). Thus, I do not accept the submission, trailed at one point in Mr Giffin's skeleton argument, that, if expert evidence is required to support an allegation of manifest error, that would of itself indicate that the error could not be manifest. In my view, that would always depend on the facts of the particular case.

[22] Having concluded that expert evidence is not generally admissible in a case of this type, but that there may be unusual circumstances which justify the use of experts, I turn to the particular facts of this case. Is this a claim where the technical background is so complex that explanatory expert evidence is required, and/or is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness?"

20. In the circumstances of this case, the material principles that apply are as follows:
- i) A party seeking to adduce expert evidence must identify the particular issues on which it considers that technical explanation may be needed, the nature and scope of the expert evidence that it wishes to rely on, and explain why it is needed to resolve the dispute.
 - ii) Where the issue for the court is compliance with procurement regulations, based on a review of the process and the decision, as opposed to the merits of the technical solution which is the subject of the procurement, in most cases it is unlikely that expert evidence will be necessary to determine the claim.
 - iii) Expert evidence may be permitted where the court is satisfied that it is necessary to explain technical issues that are not capable of agreement between the parties, and not evident from the factual witnesses and documentary evidence before the court.
 - iv) Expert evidence may be permitted where it is necessary to allow the court to reach a conclusion on manifest error, where the technical issues are particularly complex.
 - v) Expert evidence is not appropriate where that would have the effect of the experts descending into the arena and giving opinions on the matters in issue between the parties, as that would usurp the court's proper function.

Parties' submissions

21. The expert issues, the subject of the application, are listed in Mr McCarthy's fourth witness statement and set out in a table exhibited to Mr McCarthy's fifth witness statement as follows:
- i) the concept of "dwell time" and the technical, operational and behavioural features that impact dwell time;
 - ii) the ability of the JV's tendered design to meet the TTS relevant to or impacted by dwell time, including TTS-94, TTS-161, TTS-2635 and TTS-1963;
 - iii) the appropriateness and/or adequacy of the modelling work conducted by Arup reflected in the report "*Dwell Time – Lead Tenderer Assessment*" ("the Arup Report");

- iv) how modifications to the JV's train design would impact the JV's Whole Live Value Model ("WLVM") score and any other aspect of the bid that was assessed as part of the procurement;
 - v) the potential impact of the Further Substantial Design Modifications to the JV's ability to meet the TTS.
22. Ms McCredie QC, leading counsel for Siemens, submits that the technical background is so complex that explanatory expert evidence is required to allow the court to reach a proper view on the issues of manifest error or unfairness. First, Siemens is not in a position to agree technical explanations without access to the material documents. Second, expert evidence will not usurp the function of the court. The experts will not be asked to opine on whether or not the conclusions that the evaluators reached, as to whether the JV's proposals met the technical specification, were correct; rather, they will provide a technical explanation as to the interaction between the tendered design and the TTS, a matter on which the court is likely to need assistance given the complexity of the underlying technical information. Third, although modifications to the JV's design have not yet been made, Siemens' position is that modifications will be required if the JV's design is to meet the necessary dwell times and, had such modifications been made prior to submission of the JV's tender, that would have affected the evaluation.
23. Ms Hannaford QC, leading counsel for HS2, submits that, first, Siemens failed to provide any list of expert issues prior to issuing the application. Second, the issues now identified are not relevant to the pleaded case. Third, if any technical explanation is needed by the court, there is no reason why the parties cannot agree it based on Appendix I of the TTS.
24. Mr Suterwalla, counsel for the JV, submits that Siemens' application is inappropriate and unjustified. First, it is not necessary for an expert to give evidence as to the concept of dwell time, or the technical, operational and behavioural features that impact dwell time; such information can be provided by witnesses of fact. Second, expert evidence should not be permitted on the ability of the JV's tendered design to meet the TTS relevant to or impacted by dwell time because that is the very issue that the court must determine. Third, Siemens has failed to explain the need for expert evidence as to the appropriateness and/or adequacy of the modelling work carried out by Arup. Fourth, expert evidence should not be permitted on the need for any modifications to the JV's design, or the impact of any modifications on its WLVM score because those are issues for the court to determine.

Issue 1 – dwell time

25. Siemens seeks to rely on expert evidence to explain the concept of "dwell time" and the technical, operational and behavioural features that impact dwell time. In the table attached to Mr McCarthy's fifth witness statement, it is said that expert evidence is necessary for the following reasons:
- i) to explain the technical features which will impact the dwell time calculation, including dimensions of the train design and modelling assumptions, such as flow rate and how these were derived;

- ii) to explain the operational elements affecting dwell time, including the platform train interface and the impact of malfunctions to doors;
 - iii) to explain the behavioural features that affect dwell time, such as the assumptions regarding the way in which passengers use the train units, including the average age of passengers, whether they use a wheelchair, reasons for travel and any luggage.
26. There is no dispute or other issue on the pleadings as to the meaning of dwell time in the context of the TTS and ITT.
27. Dwell time is a defined term in the TTS at section 2.5:
- “the time taken for a Unit to perform all normal aspects of station operations from wheels-stop to wheels-start including alighting and boarding of passengers.”
28. Appendix I of the TTS states that in order to achieve compliance with TTS-161 the design is required to deliver a 95% confidence of achieving a 2-minute dwell according to the Static Dwell Time Model:
- “This model has been developed to allow common assessment of the key architectural elements that make up the Unit design whilst allowing for the likely development of the interior layouts following contract award.
- The assessment is based on a dimensioned set of Vehicle Layout Drawings of each Vehicle in the Unit...”
29. Thus, the TTS defines the concept of dwell time for the purpose of the tenders, sets out the material train dimensions for the purpose of tender assessment and identifies in Appendix I the modelling assumptions.
30. There is no pleaded challenge to any assessment of train dimensions, modelling assumptions in the Static Dwell Time Model, platform-train interface, malfunctioning doors or behavioural assumptions in the model.
31. It follows that the concept of dwell time does not raise an expert issue that is relevant to the pleaded case. Indeed, Siemens has not identified any relevant pleadings against this issue in its table of expert issues. Siemens has not established that expert evidence is required in respect of this issue.

Issue 2 – TTS requirements

32. Siemens seeks to rely on expert evidence to opine on the ability of the JV’s tendered design to meet the TTS relevant to or impacted by dwell time, including TTS-94, TTS-161, TTS-2635 and TTS-1963. It is said that expert evidence is necessary for the following reasons:
- i) to explain the assessment undertaken against TTS-94 by reference to the inputs enumerated in the JV's tender and to assess whether or not it was, or ought to

have been, clear to HS2 that the journey times required by TTS-94 would not be met;

- ii) to explain the mechanics of the Static Dwell Time Model, as well as the results of the JV's bid relevant to TTS-161, and the ID 2.2.23 submission; although Appendix C set out a methodology which included a fixed input of two-minute dwell times, it was irrational for HS2 to continue to rely upon that methodology as establishing that TTS-94 could be satisfied in circumstances where HS2 knew that the JV was incapable of satisfying the two-minute stops at old oak common and Preston;
 - iii) it is necessary to explain the elements of the JV's train design relevant to the requirements of TTS-2635;
 - iv) it is necessary to explain how the passenger-train interface interacted with other elements of the train design to affect dwell time for the purpose of TTS-1963.
33. The court does not set out extracts from the pleadings in full, so as to preserve the confidentiality agreements that are currently in place between the parties. However, the court has read the pleadings; what follows is a brief identification of the issues raised on the pleadings for the purpose of considering this application.
 34. At paragraph 35M of the POC Siemens pleads that the JV failed to meet the requirements for TTS-94, TTS-2635 and TTS-1963. At paragraph 61B it is pleaded that HS2 should have considered whether the JV in fact met the mandatory TTS requirements and, if it had done so, it would have concluded that the JV did not meet those requirements, including TTS-94. At paragraph 70C2 it is pleaded that HS2 acted in manifest error in not disqualifying the JV's tender by reason of its failure to meet the mandatory TTS requirements, including TTS-94 and TTS-161. At paragraph 70I(e1) it is pleaded that it was irrational for the JV to be awarded a score of "Strong" in respect of ID 2.2.23.
 35. HS2's Defence pleads at paragraph 16A(2) and (9) that the TTS-161 requirement was based on the Static Dwell Time Model, the TTS-94 requirement was measured by reference to a hypothetical journey in which a dwell time of 2 minutes was a fixed input and TTS-2635 and TTS-1963 were generic non mandatory requirements. The JV stated its compliance with the requirements. At paragraph 40A it is pleaded that the JV's Stage 2.2 scores supported its stated compliance, including question 2.2.23 in respect of TTS-161 and question 2.2.3 in respect of TTS-94.
 36. At paragraph 9A of the Re-re-amended Consolidated Reply ("the Reply"), it is pleaded that it was irrational for HS2 to continue to rely on the methodology set out in the Static Dwell Time Model, including the fixed input for dwell time.
 37. Siemens seeks to adduce expert evidence to carry out an independent assessment of the JV's compliance with the above TTS requirements. However, such an independent assessment of the technical merits of the tender would be an impermissible basis on which to challenge the decision in this procurement exercise. The issue for the court is not the respective merits of the tenders but whether the procurement process was in accordance with the Regulations.

38. Siemens raises an issue as to whether there was any manifest error in HS2's assessment of the JV's compliance with the TTS requirements by its scoring of the relevant stage 2.2 questions. However, that can be addressed by reference to the criteria set out in the ITT and TTS documents, the evaluation documents and the evidence of the assessors, which will be subject to challenge through cross-examination and submissions.
39. In my judgment, Siemens has not established that expert evidence is required in respect of this issue.

Issue 3 – the Arup Report

40. Siemens seeks to rely on expert evidence to opine on the appropriateness and/or adequacy of the modelling work conducted by Arup reflected in the Arup Report. It is said that expert evidence is necessary for the following reasons:
- i) the modelling was undertaken to assess the risks posed by the JV's train design and expert evidence is necessary to explain the exercise Arup was asked to undertake;
 - ii) expert evidence is necessary to assess the validity of the results of the Arup modelling in view of the allegation that it was likely to understate the boarding time for the JV's train design;
 - iii) expert evidence is necessary to understand and explain the results of the modelling, as well as subsequent correspondence between Arup and Mr Sterry, who engaged Arup to carry out the modelling work for HS2.
41. The pleaded issue set out in paragraph 35J of the POC is that the Arup Report is likely to understate the boarding time for the JV's train design based on assumptions as to the percentage of leisure travellers and those with reserved seats. However, as explained by Ms Zar at paragraph 41 of her fifth witness statement, the Arup Report played no part in the evaluation of the JV tender. Therefore, it does not raise an issue for determination by the court.
42. It is not clear, on the pleaded case, how the alleged deficiency in the Arup modelling could impact on the validity or lawfulness of the procurement, given that it did not form part of the tender assessment process. If Siemens seeks to undermine the Arup modelling as part of an independent assessment of the technical merits of the tender, that would be an impermissible basis on which to challenge the decision in this procurement exercise, as explained above. If, and to the extent that, Siemens wishes to rely on errors in the stated assumptions used in the Arup modelling to show a manifest error in HS2's tender assessment, it would be open to it to do that without the necessity of adducing expert evidence, by reference to the stated evaluation criteria, the evaluation documents and evidence of the assessors.
43. In my judgment, Siemens has not established that expert evidence is required in respect of this issue.

Issue 4 - WLVM

44. Siemens seeks to rely on expert evidence to opine on how modifications to the JV's train design would impact the JV's WLVM score and any other aspect of the bid that was assessed as part of the procurement. It is said that expert evidence is necessary to inform the court's assessment as to whether HS2 acted in breach in failing to take account of changes to the WLVM score as pleaded in paragraph 70E1 of the POC.
45. HS2 disputes that it took any decision to make any modifications to the JV train design, although modifications are permitted under the terms of the contract. At paragraph 16A(2)(v) of the Defence, it is pleaded that the difference to the JV's assessed price would not have been material to the tender outcome given the disparity between the parties' Assessed Price.
46. The pleaded allegation of breach by Siemens at paragraph 70E1 of the POC, stating that the impact of proposed modifications was not considered by reference to specific factors in the WLVM, does not require expert evidence. The issue is whether any, or any adequate, impact assessment was carried out. That can be tested against the documented assessments carried out by HS2 (or the absence of any relevant assessments).
47. The assertion by HS2 in its Defence, that the impact on WLVM would not have been material, can be challenged by reference to any particulars, or documents, that HS2 relies on in support of that assertion.
48. No issue has been identified on the pleadings as to the methodology or components of any evaluation exercise required to ascertain the impact of modifications to the JV train design on WLVM, on which expert evidence might be admissible.

Issue 5 – Impact of modifications

49. Siemens seeks to rely on expert evidence to opine on the potential impact of the Further Substantial Design Modifications to the JV's ability to meet the TTS. It is said that expert evidence is necessary to explain the changes implemented and to set out the impact they have against the relevant elements of the TTS.
50. The pleaded allegation of breach by Siemens at paragraph 70E1(v) of the POC, is that the impact of proposed modifications on the JV's ability to meet specific requirements of the TTS was not considered. As set out above, the general issue, as to whether any impact was assessed, can be determined by reference to the HS2 assessments. However, if and to the extent that Siemens seeks to go further and show that the proposed modifications would have had an adverse impact on the JV's ability to satisfy the TTS, it has failed to provide any particulars of such allegation. Therefore, on the pleadings, no expert issue has been identified.

Disclosure

51. Ms McCredie raised concerns about the ability of the legal team to understand the documents disclosed into Tier 1 of the Confidentiality Ring without expert input.
52. As set out above, it is open to the parties to engage the assistance of experts, even where such experts do not give written or oral testimony for the purposes of the trial. Although Siemens will have its own in-house technical expertise, the issue is whether

Siemens, or other technical experts, should have access to documents within the Confidentiality Ring.

53. That is a separate question from the matter before the court on this application. During the course of their submissions, the parties indicated that it was likely that some measure of agreement could be reached to extend Siemens' access to the Tier 1 documentation. Any matter that is not capable of agreement will be considered by the court at the next hearing.

Conclusion

54. This application turns on whether it is reasonably necessary and proportionate to permit expert evidence to be adduced to resolve any of the issues to be determined at trial, or otherwise assist the court.
55. For the reasons set out above, expert evidence is not required to resolve any of the pleaded issues. Therefore, the application is dismissed.
56. The court will hear the parties on all consequential matters arising out of this judgment.